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LEADING ARTICLES

THE SUPREME COURT AND OUR ATTITUDE TOWARDS IT ..... *Walter P. Armstrong* 385

LEGAL ASPECTS OF ADMINISTRATIVE HEARINGS AND FINDINGS—PART II ..... *Elden S. Magaw* 393

COMPLETE TABLE OF CONTENTS OF THIS ISSUE ON PAGE i

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VOLUME XII MAY, 1940 NUMBER 4

Contents

LEADING ARTICLES

THE SUPREME COURT AND OUR ATTITUDE TOWARDS IT ..... *Walter P. Armstrong* 385

LEGAL ASPECTS OF ADMINISTRATIVE HEARINGS AND FINDINGS—PART II ..... *Elden S. Magaw* 393

STATE BAR SECTION

Suggestions for the Preparation of Briefs 443

Constitutionalizing the Requisites of the Office of County Judge ..... *Lunsford Casey* 447

Report of the Executive Committee of the Junior Bar Section 450

Thirty-Fifth Annual Meeting of the Mississippi State Bar 452

NOTES

Master and Servant—Master's Tort Liability to Servant in Mississippi—The Simple Tool Doctrine 454

Master and Servant—Master's Tort Liability to Servant in Mississippi—The Changing Place of Work Doctrine 459

Annulment and Divorce in Mississippi—Deficiencies of the Present Statute and Proposed Statutory Changes 464

Jurisdiction Exercised by the Civil Courts over Ecclesiastical Matters 475

The Judicial Definition of Self Incrimination 484

The Applicability of Foreign Workmen's Compensation Acts in Mississippi 491

RECENT DECISIONS

Appeal and Error—Partial Reversal and Remand for New Trial on the Issue of Damages Alone—Grossly Inadequate Damages as Evidence of Passion, Prejudice or Corruption of the Jury 501

Bills and Notes—Discharge of Accommodation Maker by Extension of Time—Holder in Due Course Acquiring Knowledge of Accommodation After Purchase 506

Conflict of Laws—Injunction Restraining Party From Bringing Suit in Another State—Recognition of Decree in Second State 512

Damages—Expense of Litigation in Obtaining Dissolution of Injunction—Contingent Fee Agreement 515

Trespass to Personal Property—Privilege to Repossess Property Under Conditional Sales Contract—Use of Force not Permitted 518

Mississippi Law Journal

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VOL. XII MAY, 1940 No. 4

THE SUPREME COURT AND OUR ATTITUDE TOWARDS IT*

Walter P. Armstrong†

A great deal has been said and written of the Court in recent years. Much of this discussion is valueless for it consists of undiscriminating praise or unbridled abuse. It has always been so. There is a book about the court which every American interested in the workings of his government should read. It is Charles Warren's *The Supreme Court in United States History.*[1] It is just what its title implies—a story of the part the court has played in the making of our history.

If you will read this book, as I hope you will, you will find that the recent controversy about the court is as mild as a summer breeze compared with the tempest that blew around it in other generations.[2] In every instance, however, the people eventually supported the court.

You will find also that executive and legislative impatience with the court is no new thing. This was probably at its height during the Tragic Era of Reconstruction. The right of appeal was abolished in certain classes of cases to prevent testing the validity of some of the Reconstruction legislation which was palpably unconstitutional.[3] When a vacancy occured the size of the court was reduced so that Andrew Johnson might be deprived of the opportunity of naming a justice.

*An address delivered before the Association of Commerce, New Orleans, Louisiana.

†Member of Memphis, Shelby County and Tennessee State Bar Associations, Memphis, Tennessee.

[1] 2 Vols. (Rev. ed. 1935).

[2] For example see the attack on the Court by the Anti-Federalists, WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, (Rev. ed. 1935) c. 5 *et seq.*; The attack by the Abolitionists following the Dred Scott decision, *id.* at c. 26 *et seq.*; The concerted attack during the Reconstruction era, *id.* at c. 29 *et seq.*

[3] *Ex parte* McCardle, 7 Wall. 506 (U. S. 1869).

You will also find that, beginning with Washington, Presidents, with few exceptions, have named to the court men whose political and constitutional views they believed to be in general accord with their own. Sometimes they were disappointed at the result. Theodore Roosevelt was severely critical of some of the opinions of Justice Oliver Wendell Holmes, whom he had appointed. Salmon P. Chase was Lincoln's Secretary of the Treasury when the Legal Tender Acts were passed. Lincoln appointed him Chief Justice and Chase voted to hold the Legal Tender Acts unconstitutional.[4] I doubt whether Mr. Hoover reads with any great pleasure some of the opinions of his appointee, Mr. Justice Roberts.

The Court, of course, is not perfect. No human institution is. I think the sanest appraisal of it was that of James Bryce, one of the friendliest and most acute of our foreign critics. He said, in effect, that, of all the institutions devised by the founding fathers the Supreme Court has most nearly fulfilled its function as orginally conceived.[5]

Within a comparatively brief space of time we have seen the Court, as a result of deaths, resignations and replacements, greatly change its constitutional point of view.

Some people are alarmed at this change. I am not. It is but a part of the process by which the Constitution is made to mean what the people believe and want it to mean.

I believe the situation can be put quite simply. Certain provisions of the Constitution are entirely clear and specific. For illustration, it provides: "No title of nobility shall be granted by the United States."[6] This provision is so plain that it is not open to debate. Any judge who should decide that a title of nobility could be granted would violate his oath and be recreant to his trust.

Not so with many provisions of the Constituiton. "Commerce among the states," "law impairing the obligation of a contract," "due process" of law, and "equal protection of the laws"—these are general terms and not self-defining. Such of these terms as appear in the original Constitution the framers purposely left undefined and for a very practical reason. They realized that if they

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[4]WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (Rev. ed. 1935) c. 31.
[5]THE AMERICAN COMMONWEALTH (3d ed. 1903) c. 23, p. 256.
[6]ART. I, § 9 (8).

attempted specific definitions they would probably never agree on a Constitution and that if they did agree it would probably not be ratified by the States.

They preferred to write and obtain the ratification of a Constitution couched in general terms even if it was necessary to leave its interpretation to future generations speaking through the Supreme Court for which they provided.

This gave John Marshall his great opportunity. Writing on blank paper he interpreted the general terms, gave many of them a definite meaning and thus had almost as much a hand in making the Constitution as we know it as did the framers themselves.

But whether made by Marshall's court, Taney's court or Chase's court, the construction of these general clauses was, after all, but the interpretation by the court of language which had indefinite or uncertain meanings. As the court made the decisions the court can unmake them. When the court comes to consider any of these debatable questions prior decisions have only such force as they derive from their soundness, the character and learning of the men who participated in them and the extent and length of time they have been acquiesced in. Any other view would mean that the court of our era could fix a meaning on the Constitution which could only be altered by amendment, notwithstanding the fact that later another court and the people generally might conclude that the earlier decision was wrong.

The virtue of the Court lies not in the fact that its decisions are immutable. Rather it is found in the fact that its authority to expound the Constitution is recognized and acquiesced in by the people. It is found in the fact that this authority is exercised only after the questions have been thoroughly briefed and argued by counsel in a quiet court room. It is found in the fact that the vote is finally taken not in the heat of a political contest, but after thorough discussion, in the calm of the conference room. It is found in the fact that the men who make the decision are entirely divorced from any self interest.

I have already said that, like all human institutions, the Court fails of perfection. It has always seemed to me that the Court would be strengthened by a provision rendering the justices ineligible for any other office except the chief justiceship. The prestige of the Court was not raised by the fact that during Reconstruc-

tion days at least two of its members were angling for the Presidential nomination.

For these reasons I was not disturbed by the action of the Court, at the beginning of the present administration, in holding much legislation unconstitutional. This was entirely natural. A majority of the court held a political and constitutional philosophy different from that of those who had sponsored and enacted the legislation. They were called upon to construe vague phrases. They could only give to them that meaning which seemed to them to be correct. Certain it was from the beginning that this meaning would not stand unless it met the approval of the people. It would be overturned as a result either of replacements in the court, or constitutional amendments. If disapproved the only possible effect it could have was to retard, not prevent the changes.

Nor am I disturbed by the altered viewpoint of the present court. That, too, in like manner, is subject finally to the will of the people.

When it comes to political criticism of the court it must be borne in mind that for reasons easily understandable, the party in power usually favors a liberal construction of Federal powers, and the party in opposition a strict construction.

In my judgment most of the criticism leveled at the court that is not purely political is based upon a misconception of its function as I have attempted to state it.

On the first day of last month there was held in the courtroom a brief ceremony to celebrate the sesquicentennial of the court. On this occasion three men of different backgrounds and viewpoints spoke.

One was Attorney General Robert H. Jackson, who has often been a spokesman for the so-called new Deal. Another was Charles A. Beardsley, President of the American Bar Association, certainly not a radical organization. The third was the Chief Justice of the United States, who, as you will recall, was once the standard bearer of the party opposed to that now in power.

Yet as I read their addresses I do not find any material difference in their respective conceptions of the function and value of the court.

I shall briefly quote from each.

The Attorney General:[7]

"From the very beginning the duties of the Court required it, by interpretation of the Constitution, to settle doubts which the framers themselves had been unable to resolve . . .

"Thus, controversies so delicate that the framers would have risked their unity if an answer had been forced were bequeathed to this Court . . .

"They knew that to get acceptance of its fundamental design for government many controversial details were left to be filled in from time to time by the wisdom of those who were to follow. This knowledge made them bold.

"It would, I am persuaded, be a mistake to regard the work of the Court of our own time as either less important or less constructive than that of its earlier days. It is perhaps more difficult to revise an old doctrine to fit changed conditions than to write a new doctrine on a clean slate. But, as the underlying structure of society shifts, its law must be reviewed and rewritten in terms of current conditions if it is not to be a dead science.

"In this sense, this age is one of founding fathers to those who follow. Of course, they will re-examine the work of this day, and some will be rejected. Time will no doubt disclose that sometimes when our generation thinks it is correcting a mistake of the past, it is really only substituting one of its own."

Mr. Beardsley:[8]

"Gladstone's characterization of our Constitution as 'the most wonderful product ever struck off at a given time by the brain and purpose of man,' is justified by the fact that, for 150 years, this Court has approached as near as any human instutution might well be expected to approach, the fulfillment of the purpose of the framers of the Constitution, to 'establish justice' for the American people . . .

"Not only is it permissible on this occasion for us to recall that this Court is a human institution, but it is also desirable for the American people to recall, on this occasion,

[7]60 S. Ct. (Adv. Sheet) No. 7, p. xvii.
[8]60 S. Ct. (Adv. Sheet) No. 7, p. xix.

that this human institution will endure, and that justice, under and pursuant to law, will be preserved for the American people, only so long as the American people, by their alertness, fidelity, and sanity cause them to be preserved and to endure . . .

"For 150 years the American people have honored, respected, and sustained this Court, and, through the years this Court has gained for itself the gratitude and affectionate regard of the American people, because the American people have been steadfast in their devotion to the fundamental principles upon which our Government is founded, and because the American people have seen in the record of this Court the evidence of the striving by its members to be just, 'to the utmost of' their 'abilities'."

Chief Justice Hughes:[9]

"The recognition of this anniversary implies the persistence, through the vicissitudes of one hundred and fifty years, of the deep and abiding conviction that amid the clashes of political policies, the martial demands of crusaders, the appeals of sincere but conflicting voices, the outbursts of passion and of the prejudices growing out of particular interests, there must be somewhere the quiet, deliberate and effective determination of an arbiter of the fundamental questions which inevitably grow out of our constitutional system and must be determined in controversies as to individual rights. It is the unique function of this Court, not to dictate policy, not to promote or oppose crusades, but to maintain the balance between States and Nation through the maintenance of the rights and duties of individuals.

"But necessary as is this institution, its successful working has depended upon its integrity and the confidence thus inspired. By the method of selection, the tenure of ofice, the removal from the bias of political ambition, the people have sought to obtain as impartial a body as is humanly possible and to safeguard their basic interests from impairment by the partiality and the passions of politics . . .

"It should occasion no suprise that there should be acute differences of opinion on difficult questions of constitu-

[9]60 S. Ct. (Adv. Sheet) No. 7, p. xx.

tional law when in every other field of human achievement, in art, theology, and even on the highest levels of scientific research, there are expert disputants. The more weighty the question, the more serious the debate, the more likely is the opportunity for honest and expert disagreement. This is a token of vitality. It is fortunate and not regrettable that the avenues of criticism are open to all whether they denounce or praise. This is a vital part of the democratic process. The essential thing is that the independence, the fearlessness, the impartial thought and conscientious motive of those who decide should both exist and be recognized."

"As Chief Justice Marshall said: 'The people made the Constitution, and the people can unmake it. It is the creature of their will.' It is our responsibility to see that their will as expressed in their Constitution shall be faithfully executed in the determination of their controversies.

"And deeply conscious of that responsibility, in the spirit and with the loyalty of those who have preceded us, we now rededicate ourselves to our task."

If these three men find themselves so nearly in accord it should not be difficult for the rest of us, regardless of whether we always agree with its opinions, to recognize the value of the Court and to do our best in helping to maintain its position.

Indeed can we not go further and not only agree with Bryce when he said that of the institutions it had best fulfilled its functions, but also with Washington when he called it "the keystone of our political fabric?"

As I have said, there is no doubt but that the Court has recently changed its constitutional viewpoint. Nor is there any doubt but that this change, as the result of replacements, will continue.

Although I speak entirely without authority, I belive I understand that point of view.

If I may venture to adumbrate their attitude it will be to allow the greatest latitude to Congress and the state legislatures.

This, after all, is but a reflection of the view of Mr. Justice Holmes, whose conception was certainly philosophical and not political. I have not had an opportunity to verify the quotation but

in substance he said that no great harm would have been done if the Court had been deprived of the power to declare acts of Congress unconstitutional. He added that he could not say the same if the power had been withheld of voiding the acts of state legislatures. Clearly he meant that the stars in their courses were fighting for greater nationalism and that this trend, without great danger, might be left to a Congress responsible to the people. However, he was unwilling to accord an unrestricted veto to each of the forty-eight states, notwithstanding his willingness to allow them great latitude in experimentation in state legislation.

To many the views of the present court seem more advanced than did those of Justice Holmes, especially in extending the taxing power of the states over what was formerly deemed interstate commerce, as in its recent sustaining of the New York City sales tax.

My comment is twofold: First, it is doubtful whether state legislation of this type will be upheld when it branches into other subjects than taxation. Second, if it is so upheld, the remedy is with the people. By properly selecting their national and state representatives they can maintain the equipoise. That burden should not be put upon the court except in cases which clearly fall within the inhibitions of the Constitution.

When legislation, whether federal or state, is clearly contrary to the Constitution I have no doubt that the Court will invariably so declare. Even here, however, it may be overridden by constitutional amendments. This is as it should be. The duty of the Court is to construe, not to legislate. The most it can do is to give the people a lucid interval or an opportunity for sober second thought. That duty, I have no doubt, it will faithfully and courageously perform. But the ultimate responsibility is upon the people. That is as it should be in a democracy. That responsibility can only be properly discharged when every good citizen interests himself in his government local, state, and national, and takes practical steps to see that the people's representatives typify informed and thoughtful public opinion.

In conclusion and in recognition of the service the Court has rendered and the prestige it has maintained, I close by repeating the words with which the crier opens its sessions:

"God save the United States and this Honorable Court."

LEGAL ASPECTS OF ADMINISTRATIVE HEARINGS AND FINDINGS

Part II

Elden S. Magaw

Administrative Adjudication

Administrative adjudication involves the judicial process of applying existing law to concrete situations of fact. It involves the taking and weighing of evidence, determinations of fact based upon consideration of the evidence, and the making of an order supported by the findings. It, therefore, has a quality resembling that of a judicial proceeding, and is frequently described as a proceeding of a quasijudicial character.[131] The consequences of administrative adjudication may affect a person's life, liberty or property, therefore the administrative process must satisfy the requirements of the due process clause of the Constitution. While due process is not necessarily judicial process,[132] it has become well settled that due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature, and it is equally well settled that there must be notice and hearing at some stage in the proceedings, in order to prevent a determination affecting individual interest from involving a denial of due process of law.[133]

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[131]Morgan v. U. S., 298 U. S. 468, 480 (1936).

[132]"It not infrequently happens that a full discharge of their duties compels boards of officers of a purely ministerial character to consider and determine questions of a legal nature. Due process is not necessarily judicial process." Reetz v. Michigan, 188 U. S. 505, 507 (1903).

[133]Mott, Due Process of Law, c. 13. For a summary of the various situations which require notice and hearing see Note (1931) 80 U. of Pa. L. Rev. 96.

"In the comparatively few cases in which such question has arisen it has been distinctly recognized that administrative orders, quasijudicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'; or if the facts found do not, as a matter of law, support the order made." Lamar. J., in Interstate Commerce Commission v. Louisville and Nashville R. R., 227 U. S. 88, 91 (1913).

"Reluctant as we are to interfere with the enforcement of the tax laws of a state, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth amendment to protect against impairment by state action." Day J., in Central of Ga. Ry. v. Wright, 207 U. S. 127, 141 (1907).

"It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights." Stuart v. Palmer, 74 N. Y. 183, 190 (1878).

The problem has usually been treated by the courts as a constitutional one, rather than as one involving proper administrative procedure, and, whenever it was appropriate, the courts have insisted on notice and hearing. Its inappropriateness was clearly recognized in taxation cases, where insistence upon notice and hearing would hinder the operation of government, and result in no benefit to the taxpayer.

"Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations.

"In such cases the legislature, in authorizing the tax, fixes its amount and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other elements of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him.... In such cases there is no necessity for notice and hearing. The amount of the tax would not be changed by it."[134]

The situation is entirely different when the amount of the tax is made to depend upon the value of the subject of the levy. "But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[135]

[134]Hagar v. Reclamation District, 111 U. S. 701, 709 (1884).
[135]*Id.* at 710.

So where a state legislature authorizes municipal improvements without prior hearings, there is no denial of due process of law. But if the legislature commits the assessment of costs upon property specially benefited, to some subordinate administrative body, instead of fixing the tax itself, "due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."[136] If the hearing is not permitted before the assessment is made, the assessment will be valid where a taxpayer's opportunity to be heard occurs in a formal judicial proceeding brought to enforce the tax.[137]

The exercise of the police power may involve a taking of property, and it is well established that such power is limited by the inhibitions of the Fourteenth Amendment.[138] Due process of law would require notice and hearing before the property could be seized. But to that general rule, an exception exists where summary destruction is made necessary to prevent imminent danger—where the public interest admits of no delay.[139] Even in such cases there must be a provision for notice and hearing subsequent to the confiscation or destruction on the question of the necessity of the destruction. "If a party cannot get his hearing in advance of the seizures and destruction he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the fact of the unwholesomeness as claimed by them."[140]

Notice and hearing are essential where the determination of a public utility commission is involved, or a decision of one of the large and increasing number of boards regulating business is involved. Under the Hepburn Act of 1906, and the Transportation

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[136]Goodrich v. Detroit, 184 U. S. 432 (1902); Londoner v. Denver, 210 U. S. 373, 385 (1908); Chicago, M. & St. P. Ry. v. Risty, 276 U. S. 567 (1928).

[137]Hagar v. Reclamation District, 111 U. S. 701 (1884); Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526 (1895); Wells, Fargo & Co. v. Nevada, 248 U. S. 165 (1918); Utley v. City of St. Petersburg, 292 U. S. 106 (1934).

[138]Chicago, M. & St. P. Ry. v. Tompkins, 176 U. S. 167 (1900); Adams v. Tanner, 244 U. S. 590 (1917); Southern Ry. v. Virginia, 290 U. S. 190 (1933).

[139]Lawton v. Steele, 152 U. S. 135 (1894); *cf* Southern Ry. v. Virginia, 290 U. S. 190 (1933).

[140]Northern American Cold Storage Co. v. Chicago, 211 U. S. 306, 316 (1908). The court intimated in this case that to apply the doctrine of collateral attack to situations other than emergency ones, would involve a denial of due process, but at the same time declared that it was for the legislature to determine when an emergency existed.

Act of 1920, determinations of the Interstate Commerce Commission, with respect to unreasonable rates, discriminatory rates, switching connections, division of joint rates, pooling, railroad control of motor carriers, valuation, extension of time for new construction, and abandonment, require notice and hearing.[141]

Hearings are provided for in the Communications Act of 1934,[142] the Federal Trade Commission Act,[143] the Packers and Stockyards Act,[144] the Bituminous Coal Act,[145] the National Labor Relations Act,[146] the acts pertaining to alien exclusion and deportation,[147]—to name only a few—thus satisfying the requirements of due process, since the determinations of the administrative agencies acting under such statutes affect in some way the liberty or property of those to whom the acts apply.

The requirement of a hearing becomes very significant in view of the fact that statutes delegating adjudicative functions to administrative bodies, usually provide that the findings of fact shall be conclusive if supported by evidence. The finality accorded administrative determinations depends upon the granting of the hearing required by law; and whether or not that hearing has been given, is a question for the determination of the courts. Attention will now be turned to the cases for the purpose of ascertaining the requisites of an administrative hearing, a matter of importance, not only to the administrative agency, but also to those directly affected by administrative action.

Requisites of a Hearing

Notice and hearing are more than mere formalities. Even though a determination is made after notice and hearing, it does not necessarily follow that the essential elements of justice and reasonableness have been adhered to in the trial. Therefore, the courts have insisted that it is the prerogative of the judiciary to review the action of administrative agencies. The review, however, is a judicial one rather than administrative, and questions of law only form the appropriate subject of judicial determinations. The questions that are appropriate for judicial decision are whether the ad-

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[141] Chicago Junction case, 264 U. S. 258, 285 (1924).
[142] 48 STAT. 1082 (1934), 47 U. S. C. A. § 303 (Supp. 1939).
[143] 38 STAT. 717 (1914), 15 U. S. C. A. § 41.
[144] 42 STAT. 159 (1921), 7 U. S. C. A. § 181.
[145] 50 STAT. 72 (1936), 15 U. S. C. A. § 829 (Supp. 1939).
[146] 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (Supp. 1939).
[147] 39 STAT. 887 (1916), 8 U. S. C. A. § 153. 41 STAT. 593, 594 (1920), 8 U. S. C. A. § 157.

ministrative agency has acted within the authority conferred by the legislative body, and whether the proceedings satisfy the pertinent demands of due process.[148] The insistence by the courts of their right to pass upon such questions sufficiently guarantees against arbitrary and unreasonable action by an administrative agency. While the courts have recognized the desirability of promoting the efficiency of government by allowing its representatives considerable freedom in the performance of their public functions,[149] they have showed no tendency to disregard the rights of private parties, but, on the contrary, continually recognize the desirability of securing to the individual, by procedural safeguards, those rights deemed fundamental under our system of government.

The meaning and purpose of the concept "hearing" is well explained by Mr. Chief Justice Hughes, who, speaking for the court in the familiar case of *Morgan v. United States*,[150] said:

"The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."[151]

It is, therefore, apparent that due process of law embraces the fundamental requirement that the administrative hearing be fair and impartial. This principle of constitutional law was affirmed in *Kwock Jan Fat v. White*,[152] a Chinese exclusion case involving the question "whether the hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice em-

[148]Federal Radio Commission v. Nelson Bros. B. & W. Co., 289 U. S. 266 (1933).

[149]"When the government is dispensing a bounty, when it is admitting aliens, a proper balancing of the interests involved leads the Supreme Court to give greater liberty to the executive official; when vested rights, or personal liberty are involved, a more rigid control is kept over executive officers. This results in having rules of one kind for the exercise of the police power, of another for taxation, of another for aliens, of still another for the operation of various kinds of business." Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 HARV. L. REV. 127, 153.

[150]298 U. S. 468 (1936).

[151]*Id.* at 480, 481.

[152]253 U. S. 454 (1920).

braced within the conception of due process of law." With respect to the power given by Congress to the Secretary of Labor over Chinese immigrants and persons of Chinese descent, the court observed that: "It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race,"[153] and to preserve these rights "It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power. . . ."[154]

It should be noted that, while administrative findings as to what the facts are, may be made conclusive, decisions on the question whether these facts, as found, bring the case within the terms of the statute, cannot be made conclusive upon the courts by legislation. If this were not true, an administrative agency could set the limits of its own authority at will. "The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the government . . .) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it."[155] That is true because:

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality."[156]

In determining the validity of a hearing afforded by an administrative body, the question is frequently one of interpreting a statutory requirement that there be a "fair", "full", or "public" hearing. In such a case the hearing intended by the legislature is obviously the type of hearing which the courts have said must be given under the circumstances, in order to sustain the validity of the administrative determination. The duty to afford a hearing may, therefore, have a statutory, as well as a constitutional, basis.[157]

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[153] *Id.* at 464.
[154] *Id.* at 464.
[155] St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 77 (1936).
[156] *Id.* at 84.
[157] "If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order

What then, are the attributes of a fair and impartial hearing which dues process of law requires? Obviously in adversary proceedings, in which the functions of the administrative agency are quasi-judicial, there would exist the right to be advised as to the claims of the opposing party, otherwise a hearing would be a farce. In *Morgan v. United States*[158] the validity of a rate prescribed by the Secretary of Agriculture acting under the Packers and Stockyards Act[159] was attacked on the ground that the Secretary's order was made without the hearing required by the statute.[160] The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates, but no specific complaint was formulated. In the absence of any definite complaint, a sweeping investigation was conducted, and thousands of pages of testimony were taken by the examiner. The Government formulated no issues and did not furnish any statement or summary of its contentions. A request that the examiner prepare a tentative report was refused, and after the hearing, findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representative had conducted the proceedings for the Government. No opportunity was afforded to appellants for the examinations of the findings, although such findings were, with a few exceptions, accepted by the Secretary of Agriculture. After the hearing, oral argument was had, but the discussion on behalf of the government was very general, and insufficient to inform appellants as to the Government's concrete claims. Relative to the contention that the order was made without the hearing required by the statute, the court said:[161]

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad con-

to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied." Morgan v. United States, 298 U. S. 468, 477 (1936). Therefore, if the statute denies a right to a hearing the statute is unconstitutional. If the statute provides for a hearing and a "fair hearing" is denied, the administrative agency has acted beyond the power conferred and its act is *ultra vires* and void.

[158] 304 U. S. 1 (1938).

[159] 42 STAT. 159 (1921), 7 U. S. C. A. § 181.

[160] § 310 of the Act provides: "Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or disciminatory, the Secretary—(a) may determine and prescribe what will be the just and reasonable rate or charge, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; . . ."

[161] 304 U. S. 1, 14, 15 (1938).

trol over activities which in their detail cannot be dealt with directly by the Legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing', essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'[162] And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing'."

Admittedly a hearing was given, but was it the type of hearing that satisfied the "rudimentary requirements of fair play"? The court continued with the statement that:

"The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contact with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."[163]

Since the facts showed that no such reasonable opportunity was afforded, the hearing was fatally defective and the order was invalid.

Insistence upon the maintenance of proper standards appears very reasonable. Meeting the requirements of fair play can hardly be said to so burden an administrative agency as to make it impossible for it to perform its functions. The Supreme Court has said:[164]

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[162]Citing St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 73 (1936); Morgan v. States, 298 U. S. 468 (1936); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 293, 304, 305 (1936), Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, 393 (1937).

[163]304 U. S. 1, 18, 19 (1938).

[164]*Id.* at 22.

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

In view of several references[165] by the court to the fact that the trial examiner failed to prepare a tentative report as a basis for exceptions and argument, the question arises as to whether the preparation of such intermediate report is essential to the validity of the administrative proceeding. In a former opinion[166] in the same case, the court had observed that while it was good practice to have the examiner receiving the evidence in such a case prepare a report as a basis for exceptions and argument, it could not say that that particular type of procedure was essential to the validity of the proceeding. Counsel for the Government called the court's attention to that observation, and drew forth the following explanation, which must be considered in the light of the fact that in the first *Morgan* case the allegation was that the Secretary, who made the order, had not considered and appraised the evidence. The court said:[167]

"That is true, for, as we said, what the statute requires 'relates to substance and not form.' Conceivably, the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon, and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable

[165] *Id.* at 16, 19, 21.
[166] 298 U. S. 468, 478 (1936).
[167] 304 U. S. 1, 21, 22 (1938).

opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect."

From this explanation, it is concluded that there is no need to submit an intermediate report or tentative findings when the respondent is otherwise sufficiently advised as to the claims of the opposing party, and has had opportunity to meet them by argument. In the instant case, the failure to submit proposed findings becomes vitally significant because the respondent had not, by other procedure, been advised as to the contentions of the Government, and therefore had no opportunity to contest them.

This conclusion appears to find support in *National Labor Relations Board v. Biles Coleman Lumber Company*.[168] In that case the Board petitioned for the enforcement of its order, and the respondent answered and pleaded, *inter alia*, as an affirmative defense, that proposed findings and conclusions of the Board had not been submitted to it. It was held that the allegation failed to state facts constituting a denial of due process in view of the fact that at the hearing in the Circuit Court of Appeals it was admitted[169] "(a) that the Board's order is supported by charges fully and definitely advising the Lumber Company both of what was sought to be proved at the hearing and what was sought to be ordered; (b) that at a hearing before the Trial Examiner there was argument afforded it upon all the evidence taken in the proceeding and that the Board's attorney fully presented the Board's contentions of law and fact upon which the Board's order was finally made; (c) that thereafter, before action or recommendation by the Trial Examiner, the case was transferred to the Board for hearing upon the testimony taken by the Trial Examiner, and prior to the Board hearing, the matter was fully briefed for the Board by the Lumber Company; (d) that at the hearing the Lumber Company was allowed full opportunity to argue its case." The conclusion of the court that due process does not require the submission of proposed findings when the respondent has otherwise been fully advised of his opponent's claims, was made with due regard to the *Morgan* case, for the court said:[170]

"We take it that what is said in *Morgan v. United States* . . . concerning the failure of the Secretary of Agriculture to submit such proposed findings to the party subject to his order, has to do

[168] 98 F. (2d) 16 (C. C. A. 9th, 1938).
[169] *Id.* at 18.
[170] *Id.* at 18.

with no more than their necessity to advise such party of the specific contentions of law and fact relied upon for the Secretary's order, *where, as in that case, there was no complaint, brief or argument on behalf of the Secretary* which informed the ordered party of the contentions on which the order sought to be made by him was to be based. Here there was no absence of such advice and hence no reason to submit the findings."

That the Fifth Amendment guarantees no particular form of procedure, but does protect substantial rights is clearly shown by the case of *National Labor Relations Board v. Mackay Radio & Telegraph Company.*[171] The contention was made that the respondent company had been denied a fair hearing. The contention was based on the fact that it was summoned to answer a complaint that it discriminated by *discharging* five men, and then after all the evidence was in, the complaint was withdrawn and a new one presented asserting that the discrimination was based on a *refusal to re-employ* the five men. Thereafter, when the Board came to make its findings, it reverted to the position that the wrongful act was not a failure to re-employ, but a wrongful discharge. The respondent, therefore, claimed that it was found guilty of a wrongful labor practice which was not within the issues upon which the case was tried. With respect to this contention, the court observed that the position was highly technical, and then turned to a review of the record, not for the sole purpose of determining the truth of the allegation, but for the more fundamental purpose of ascertaining whether the Board's procedure had in any way prejudiced the respondent company. As a result of its search of the record the court concluded that "at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence pro and con, was directed to the question whether, when the strike failed and the men desired to come back and were told that the strike would be forgotten and that they might come back in a body . . . the respondent did in fact discriminate against the remaining five because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory."[172]

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[171] 304 U. S. 333 (1938).
[172] *Id.* at 350.

It also appeared in this case that prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board, and denied the respondent's motion to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report. Oral argument was had before the Board after which it made its findings of fact and conclusions of law. Respondent claimed that the failure of the Board to follow its usual practice of the submission of a tentative report by the Trial Examiner, and a hearing on exceptions to that report, deprived the respondent of opportunity to call to the Board's attention the aforementioned variance between the allegations of the complaint and the Board's findings. In response to this claim the court observed:[173]

"What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure, the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights.[174] The contention that the respondent was denied a full and adequate hearing must be rejected."

Right To Present Evidence

The right to present evidence is implicit in the right to a hearing.[175] The primary purpose in affording a hearing to one whose liberty or property may be legally affected, either by judicial or administrative proceedings, is to inform the judicial or administrative body of all the facts, so that its decision may be a just one. The "rudimentary requirements of fair play" certainly demand that judgment shall not be passed upon a person until he has been given opportunity to present his side of the case.[176] "Indispensable

[173]*Id.* at 350, 351.

[174]Here the court invites comparison to Morgan v. United States, 298 U. S. 468 (1936).

[175]Morgan v. United States, 304 U. S. 1, 18 (1938). "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

[176]In Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418 (1890) an Act of the Minnesota legislature which permitted the Commission to fix railway rates without notice, was involved. The court held that the Act conflicted with the due process clause. The court said at pages 457, 458: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of

requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; . . . that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; . . ."[177]

The right to present evidence includes the right to produce witnesses and to have their testimony introduced into the record.[178] This is reasonable because the party involved may not be able to prove material facts by his own testimony, and even if he had personal knowledge, his testimony might not carry the same weight as that of a disinterested party.

Another important right inherent in a fair and impartial hearing, is the right to support one's contentions by argument. "The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."[179] In ex parte *Cahan*[180] and *Tisi v. Tod*,[181] alien deportation cases, the court seemed to assume that the right to submit argument was an essential of a fair hearing, because in each case, in answer to the contention that the hearing granted was unfair, it was pointed out that the right to submit argument had been granted.

Even in tax proceedings of a quasijudicial nature, it has been held that a hearing involves the right to support the allegations by argument. In *Londoner v. Denver*,[182] an assessment case where the landowners involved had been permitted to formulate and file complaints and objections to proposed administrative action, but were denied any further right to be heard, the Supreme Court held that there was a denial of due process. The court said:[183]

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justice . . . No hearing is provided for,—no summons or notice to the company before the commission has found what it is to find, and declare what it is to declare,—no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law. . . ."

[177]Whitfield v. Hages, 222 Fed. 745, 749 (C. C. A. 8th, 1915).

[178]Whitfield v. Hages, 222 Fed. 745, 749 (C. C. A. 8th, 1915); Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418 (1890).

[179]Morgan v. United States, 298 U. S. 468, 480, 481 (1936).

[180]42 F. (2d) 664 (S. D. Cal. 1930) *aff'd*, 47 F. (2d) 604 (C. C. A. 9th, 1931), *cert. denied*, 283 U. S. 862 (1931).

[181]264 U. S. 131 (1924).

[182]210 U. S. 373 (1908).

[183]*Id.* at 386.

"If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it, shall have the right to support his allegations by argument however brief, and, if need be, by proof however informal."

Whether a party is entitled to oral argument rather than written argument is not so clear, although in the first *Morgan* case the court stated that "argument may be oral or written".[184] Since the due process clause of the Constitution does not guarantee any particular form of procedure, but does protect substantial rights,[185] it would seem to be a question as to whether the denial of the right to present oral argument resulted in any prejudice to the party involved. That which could be presented orally could certainly be submitted in printed form. It may be argued that there is more force in the spoken word, and that permitting oral argument would assure that the argument was heard, whereas there is no assurance that a written brief would be considered *in toto,* nor read by all the members of the administrative tribunal. If the apparent tendency of administrative tribunals is to place too much reliance upon the proposed findings of its subordinates, without careful consideration of the record prior to the adoption of the tentative findings, this difficulty could be avoided by permitting oral argument. Also, the view may be taken that the nature of the right involved should determine whether oral or written argument should be allowed. It has been said[186] that "on principle, it would seem that in certain cases, especially where human liberty is involved, the oral hearing is intrinsically more just; while, on the other hand, where rights of property are concerned, not infrequently the submission of written evidence and printed argument may result equally well in obtaining justice."

Under the Rules and Regulations of the National Labor Relations Board it is provided that[187] "Any party to the proceeding shall

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[184]298 U. S. 468, 481 (1936).

[185]National Labor Relations Board v. Mackay Radio & Tel. Co., 304 U. S. 333, 351 (1938).

[186]Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court,* (1921) 35 HARV. L. REV. 127, 153, cited *supra* note 149.

[187]§ 29, Rules and Regulations, Series 1, as amended (April 27, 1936).

be entitled to a reasonable period at the close of the hearing for oral argument, which shall not be included in the stenographic report of the hearing unless the Trial Examiner so directs. The parties shall be entitled to file briefs or written statements only with the permission of the Trial Examiner." Whether argument shall be allowed before the Board, is discretionary with the Board.[188]

It is the practice of the Interstate Commerce Commission to allow oral argument before the full tribunal, or one of its divisions, after the Trial Examiner's report containing his findings of fact and conclusions have been served upon the parties.[189] Likewise the Federal Trade Commission allows oral arguments before the Commission.[190]

It would appear to be more logical from the standpoint of justice to allow oral argument before the body to which the power to make the ultimate decision has been delegated.[191] The practical objection to this procedure, where litigation is extensive, would be the amount of time involved. But convenience of administration can hardly justify a procedure which may result in noncompliance with the law.

Right to Counsel

It would appear to be a fundamental right of a party to be represented by counsel in a hearing involving liberty or property rights, particularly where complicated legal questions are involved. In deportation cases, in which the proceedings are civil, rather than criminal, in nature,[192] although arrest of the person is involved, the right to counsel has been held to be an element of due process. In ex parte *Hidekuni Iwata*[193] it is said:

[188] § 10 (c) of the National Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (Supp. 1939) provides: The testimony taken by such member, agent or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter in its discretion, the Board upon notice may take further testimony or hear argument. . . .

[189] Interstate Commerce Commission—Procedure, Hon. Clyde B. Atchison, SEN. REP. No. 8, 71st Cong., 1st Sess.

[190] From an address by Hon. W. T. Kelley, Chief Counsel of the Federal Trade Commission, reprinted in part in MAURER, CASES AND MATERIALS ON ADMINISTRATIVE LAW 538.

[191] "Without such an opportunity the natural tendency of the tribunal to rely on its agent's recommendations might result in transferring the real function of decision to the subordinate officer; where this opportunity is permitted a comparison of the arguments with the recommendations normally should clearly present to the tribunal the conflicts of facts and interests involved without examination of the entire transcript of testimony." Note (1932) 80 U. OF PA. L. REV. 878, 880 (1932).

[192] Wong Wing v. United States, 163 U. S. 228 (1896).

[193] 219 Fed. 610, 611, 613 (S. D. Cal. 1915).

" 'Due process of law' is secured, as to such aliens as may be brought before the immigration officers, if they are given substantial notice of the reasons urged why they should be deported from this country, if they are given a fair and reasonable opportunity to present evidence contraverting any evidence adduced by the department and tending to exculpate them from the commission of the unlawful acts urged against them, if they are afforded at some stage of the hearing reasonably early therein, so as to be of some substantial advantage to them, the opportunity to secure and to have the advice and assistance of counsel. . . . ."[194]

In ex parte *Chin Loy You*[195] the right to counsel was again emphasized. The views of the two courts were cited with approval by the Supreme Court in the criminal case of *Powell v. Alabama*.[196] There it was pointed out that, in numerous other cases, the court, in determining that due process was accorded, has frequently stressed the fact that the defendant had the aid of counsel, and cited, among others, were the two deportation cases just considered. The court said: "In *ex parte* Hidekuni, the Federal district judge enumerated among the elements necessary to due process of law in a deportation case, the opportunity, at some stage of the hearing, to secure and have the advice and assistance of counsel. In *ex parte* Chin Loy You . . . also a deportation case, the district judge held that under the peculiar circumstances of the case, the prisoner, having seasonably made demand, was entitled to confer with and have the aid of counsel."[197]

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[194]It was held in Low Wah Suey v. Backus, 225 U. S. 460 (1912) that it was no denial of due process of law to permit a resident alien to have counsel only when a certain stage in the proceedings had been reached, provided counsel is permitted to meet evidence previously introduced.

In alien exclusion cases, aliens who present no substantial evidence of citizenship and who have not become a part of the population of the United States by actual entry, and therefore have no constitutional right to a hearing, are not given by statute the right to be represented by counsel at the hearing before the Board of Special Inquiry but are given the right to counsel in appeals to the Secretary of Labor. A provision in the statute that such aliens might have one friend or relative present was held to exclude counsel on the theory that the exclusive power of Congress over immigration negatived implied limitations on the methods employed by immigration officers in the performance of their delegated functions. Brownlow v. Miers, 28 F. (2d) 653 (C. C. A. 5th, 1928).

[195]223 Fed. 833, 838 (D. Mass. 1915). In this case the court said: "It is true that the right to counsel secured by the Constitution (Amendment 6, § 1) relates only to criminal prosecutions; but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner. See too, Amendment 14. To make the defendant's substantive rights invoked in a matter involving personal liberty depend on whether the proceeding be called 'criminal' or 'civil' seems to me unsound."

[196]287 U. S. 45 (1932).

[197]*Id.* at 69. See also, Colyer v. Skeffington, Comm'r of Immigration, 265 Fed. 17 (D. Mass. 1920); United States v. Williams, 185 Fed. 598 (S. D. N. Y. 1911).

If due process of law involves the right to counsel in cases where rights of the person may be jeopardized by lack of representation by counsel, it would seem to follow that the same right would exist where property rights are involved, in view of the fact that the due process clauses of the Constitution make no distinction between personal and property rights.

Right of Cross-Examination

If, in determining the requirements of a hearing, regard must be had to judicial standards, not in any technical sense, but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature,[198] it would appear that a fair and impartial hearing involves the right of cross-examination. It has been said[199] that "for two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses and the puerilities which are so often associated with cross-examination have availed to over-balance its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

Significant also, is the judicial pronouncement of the court in The *Ottawa*,[200] where, in commenting on the right of cross-examination the court said:

"Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of events as narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness and integrity of the witness . . ."

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[198]Morgan v. United States, 304 U. S. 333 (1938).
[199]2 WIGMORE, EVIDENCE (2d ed. 1923) § 1367.
[200]70 U. S. 268, 271 (1865) (an admiralty case).

The same reasons that require opportunity for cross-examination in judicial proceedings apply as well in quasijudicial proceedings. In each, personal or property rights are involved, and in administrative, as well as judicial proceedings, substantial rights of the parties are to be guarded.

In *Whitfield v. Hanges*,[201] a deportation case, the court stated that one of the "indispensable requisites" of a fair hearing was the opportunity to be heard "that he may, if he chooses, cross-examine the witnesses against him." In ex parte *Cahan*[202] the same principle was recognized, for, in answer to the contention that a fair hearing was denied, the court said: "At the hearing of the order to show cause before the immigration authorities, the alien was represented by counsel; was permitted to inspect the record of the evidence previously obtained; was given the right to cross-examine witnesses; was permitted to introduce evidence on his own behalf; his counsel was given the right to file brief and submit argument; and no right seems to have been denied the alien that would fairly represent his status."

The contention was made in *Tisi v. Tod*,[203] that rights guaranteed by the Federal Constitution had been denied the alien. In determining whether there was a denial of due process, the United States Supreme Court pointed out that the many witnesses produced by the Government were cross-examined by the alien's counsel. Since there was no evidence showing unfair or arbitrary action, the contention was held to be unfounded. In *Gonzales v. Zubrick*,[204] it was held that the alien, who could not understand English, had been denied due process of law in a hearing where the testimony was in English without translation, as a result of which he was deprived of an opportunity to cross-examine the witnesses.

The right of cross-examination exists not only in administrative proceedings of a quasijudicial nature involving personal rights, but also in proceedings involving property rights. In *Interstate Commerce Commission v. Louisville & Nashville R. R. Company*,[205] the validity of a rate order made by the Commission was attacked on the ground that the hearing required by law had not been given.

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[201] 222 Fed. 745 (C. C. A. 8th, 1915).
[202] 42 F. (2d) 664 (S. D. Cal. 1930), cited *supra* note 180.
[203] 264 U. S. 131 (1924).
[204] 45 F. (2d) 934 (C. C. A. 6th, 1930).
[205] 227 U. S. 88 (1913).

In the course of its opinion the court pointed out that "all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses . . ."[206]

The due process requirement of notice and hearing was also held in *Garfield v. United States* ex rel. *Spalding*,[207] a case involving a hearing upon the withdrawal of a license to practice before the Department of the Interior, to include an opportunity to cross-examine the witnesses. To deny the right is to deny a fair hearing, and also to impede rather than to assist an administrative body in determining facts.[208]

Decision Must Be Based on Evidence of Record

Corollary to the right of cross-examination is the well settled rule that the decision of the administrative body must be based on evidence of record; that nothing can be considered as evidence which is not introduced as such. Such a rule is a wholesome one; it protects against arbitrary action. It enables the courts to determine whether the administrative agency has acted within the scope of the authority delegated to it by the legislature.

In *Interstate Commerce Commission v. Louisville & Nashville R. R.*,[209] it was insisted by the Government that under the Hepburn Act of 1906[210]—which provided that rates should be set aside if, after hearing, the "Commission shall be of the opinion that the charge was unreasonable"—an order based on such opinion is conclusive and could not be set aside, even if the finding was wholly without substantial evidence to support it. That contention was denied in no uncertain terms. The court said:[211]

"But the statute gave the right to a full hearing, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exer-

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[206] *Id.* at 93.
[207] 32 App. D. C. 153 (1908).
[208] Chicago & E. I. Ry. v. United States, 43 F. (2d) 987 (N. D. Ill. 1930).
[209] 227 U. S. 88 (1906).
[210] 34 Stat. 584 (1906), 49 U. S. C. A. § 1.
[211] 227 U. S. 88, 91 (1923).

cised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

It was further insisted by the Government that the Commerce Act[212] required the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates, it could act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. To this contention, the court replied:[213]

"But such a construction would nullify the rights to a hearing, —for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. . . . The Commission is an administrative body and, even when it acts in a quasijudicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient, evidence to support its finding."

This principle of law was reiterated in *United States v. Abilene & Southern Ry.*[214] In this case the contention was made that the order of the Interstate Commerce Commission was invalid because it rested upon evidence not legally before the Commission. It was conceded that the finding of the Commission related, in part,

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[212] 26 STAT. 743 (1890), 49 U. S. C. A. § 12.
[213] 227 U. S. 88, 93, 94 (1923).
[214] 265 U. S. 274 (1924).

upon data taken from the annual reports filed with the Commission by the carriers; that the reports were not formally put in evidence, and that the parts containing the data relied upon, were not put in evidence through excerpts. The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove in order to sustain the Commission's order. The Commission attempted to justify its action on the ground that the examiner had given notice that it would probably be necessary to refer to the annual reports of the carriers. The court held that the order of the Commission was void, for a finding without evidence is beyond the power of the Commission, and nothing can be treated as evidence which is not introduced as such. In the words of the court:[215]

"The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding reference be made, is essential to the preservation of the substantial rights of the parties."

That is to say, general notice that the Commission would rely upon the voluminous annual reports is not sufficient. The Commission should have introduced, by specific reference, such parts of the reports as it wished to treat as evidence, and thus afforded the opportunity to "test, explain, or refute".

In *West Ohio Gas Company v. Public Utilities Commission of Ohio* (*No.* 1)[216] the contention was made that the company had been deprived of rights guaranteed by the Fourteenth Amendment. The Commission, by an order made without the company's knowledge, directed that certain annual reports be introduced in evidence and made a part of the record. The Commission then proceeded to act on the basis of facts ascertained from such reports. The Supreme Court, after observing that it "does not sit as a board of revision with power to review the action of administrative agencies upon grounds unrelated to the maintenance of constitutional immunities" said:[217]

"Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility

[215] *Id.* at 289.
[216] 294 U. S. 63 (1935).
[217] *Id.* at 70.

of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument[218] to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error. But the weakness of the case for the appellee is that the fundamentals of a fair hearing were not conceded to the company. Opportunity did not exist to supplement or explain the annual reports. . . ."

Consequently, the action of the Commission "was an exercise of arbitrary power", at variance with "the rudiments of fair play" and "The Fourteenth Amendment condemns such methods and defeats them."[219]

These principles were reaffirmed in no uncertain language in *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*,[220] where, after reiterating the principle that "a hearing is not judicial in any adequate sense, unless the evidence can be known" the court said:[221]

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored."

It was also pointed out in this case that the regulatory body could not justify its decision without evidence of record as an instance of judicial notice, for even if the matter is of such a nature that the agency may take judicial notice of it, the company is entitled to be informed of the fact that judicial notice is to be taken of certain matters because "notice, even when taken has no other effect than to relieve one of the parties to a controversy of the burden of re-

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[218]Citing Southern Ry. v. Virginia, 290 U. S. 190 (1933).

[219]294 U. S. 63, 71 *Cf.* Local Government Board v. Arlidge (1915), A. C. 120 and Wilson v. Esquimalt & Nanaimo Ry. (1922), 1 A. C. 202. In the first case the court refused to invalidate an administrative closing order directing the closing of a tenement house, the order having been based largely upon an *ex parte* investigation and report which the aggrieved party was not even permitted to examine. It was held that a judicial type of procedure was not required; that the only limitation upon the powers of the tribunal were those created by a spirit of responsibility resting upon all tribunals whose duty it is to mete out justice.

In the second case the court refused to invalidate a minister's decision concerning a land grant although the effect of the decision was to deprive the company of property which it claimed as its own. The hearing granted in this case prior to the administrative decision was so conducted that the company was not allowed to hear the testimony of opposing witnesses nor to cross-examine them.

[220]301 U. S. 292 (1937).

[221]*Id.* at 305.

sorting to the usual forms of evidence. Wigmore, Evidence, Sec. 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' "[222]

Substantial rights must also be protected in cases not involving property rights. In *Whitfield v. Hanges*,[223] an alien deportation case, this language was used:

"Indispensable requisites of a fair hearing are that . . . the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."[224]

In *Pantages v. Hayes*,[225] the question as stated by the court was: "Is a fair hearing accorded when an immigration inspector takes all of the testimony on behalf of the government *ex parte* and privately in advance of the warrant of arrest, reducing the same to writing largely in narrative form and in his own language, producing only a copy at the hearing and informing the alien that the original will be considered in his case, and then merely producing the witnesses and offering the alien the privilege of examining them?" This question was answered in the negative upon the authority of the *Whitfield* case, with the comment that the decision requiring evidence to be taken at the hearing is sound and in accord with the principles of due process of law.

Decision Must be Made by One Who Has Considered and Appraised the Evidence

In *Morgan v. United States*,[226] the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies for buying and selling live stock at the Kansas City Stockyards was attacked on the ground that the full hearing required by statute had not been accorded. The contention was first made in the District Court in a suit brought against the United States and the Secretary of Agriculture, to enjoin enforcement of the rate order. The allegation was that a full hearing was denied because the Secretary did not hear arguments or the evidence, but delegated that duty to the Assistant Secretary, and

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[222] *Id.* at 301, 302.
[223] 222 Fed. 745 (C. C. A. 8th, 1915).
[224] *Id.* at 749.
[225] 15 F. Supp. 1053, 1054 (N. D. Iowa 1936).
[226] 298 U. S. 468 (1936).

that the Secretary made the rate order without having read or considered the evidence. The District Court sustained a motion to strike the allegation and upheld the validity of the order,[227] and an appeal to the Supreme Court followed.

The rate order had been issued in purported accordance with the Packers and Stockyard Act of 1921, as amended.[228] The Act provides[229] that all rates or charges made for any stockyard services shall be just, reasonable, and non-discriminatory, and any unjust, unreasonable, or discriminatory rate is prohibited. The Secretary is authorized[230] to entertain complaints that the law is being violated. Section 310 of the Act provides:

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

In the order signed by the Secretary was a recital that careful consideration of the entire record in the proceeding had been given. Should this recital be given such conclusive effect as to pre-

[227]Morgan v. United States, 8 F. Supp. 766 (W. D. Mo. 1934).
[228]42 STAT. 159 (1921), 7 U. S. C. A. § 181.
[229]42 STAT. 164 (1921), 7 U. S. C. A. § 206.
[230]42 STAT. 165 (1921), 7 U. S. C. A. § 210.

clude any inquiry into the actual procedure of the Secretary? Relative to this question the Court observed that when the Secretary acts within the authority conferred by satute, his findings of fact are conclusive, and then went on to say:[231]

"But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion. If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearings. For the statute itself demands a full hearing and the order is void if such a hearing was denied."

After these observations, the court turned to the question whether the District Court erred in striking out the allegation that the Secretary made the rate order without having read any of the evidence, and without having heard the oral arguments, or having read or considered the briefs which the plaintiffs submitted, and that the only information which the Secretary had was derived from consultation with employees of the Department of Agriculture. The answer to the question will depend upon the nature of the hearing which the statute prescribes.

The court pointed out[232] that a proceeding under the Act required the taking and weighing of evidence, determination of fact based upon the consideration of the evidence, and the making of an order supported by such findings, and therefore, has a quality resembling that of a judicial proceeding. It is a proceeding of a quasijudicial character, and the requirement of a full hearing "has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion unifluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the

[231] 298 U. S. 468, 477 (1936).
[232] *Id.* at 480.

hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."[233]

From this it is apparent that the District Court had erred in denying the plaintiffs the right to try the issue raised by their petitions of whether or not the Secretary himself had judicially appraised the evidence, unless the Act be construed as delegating the rate making power to the Department of Agriculture rather than to the Secretary himself in person. In view of the requirements of a "full hearing" the court concluded that:[234]

"There is thus no basis for the contention that the authority conferred by Section 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact, and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

Therefore the District Court erred in striking out the allegations with respect to the Secretary's action. The allegations should be answered in order to determine whether a proper hearing was afforded, to determine whether the one who decided had considered the evidence.

Does the court's decision that the one who decides must hear, mean that such party is bound to conduct the hearing from beginning to end? If so, obviously the Act could not be administered in

[233] *Id.* at 480, 481.
[234] *Id.* at 481.

view of the many duties of the Secretary. The court answered the question in these words:[235]

"This necessary rule (that the one who decides must hear) does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon the evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The case therefore established the proposition that where it is alleged that the Secretary (or administrative body) has issued an order without having judicially considered and weighed the evidence, a case is made for judicial investigation.

A case similar to the *Morgan* case is *National Labor Relations Board v. Cherry Cotton Mills.*[236] A petition by the Board for enforcement of an order stated that the matter was heard by a trial examiner designated by the Board, then transferred by the Board to itself, and that oral argument by the respondent was heard by the Board; that the Board, having duly considered the matter and being sufficiently advised in the premises, was of the opinion, based upon all the testimony and evidence in said case, that the respondent had been and was then engaged in certain unfair labor practices affecting commerce. It also stated the findings of fact and conclusions of law, and the order entered thereon. The petition was signed by the Chairman of the Board and another member. The respondent answered that the order was illegal and invalid for want of a fair hearing, and alleged, *inter alia,* that the Board never at any time heard or gave judicial consideration to the evidence submitted at the hearing, but that the same was considered only by "hirelings" not vested by law with judicial duty and responsibility. It was further alleged that the Board had referred the case for analysis and a report of proposed findings of fact and conclu-

[235] *Id.* at 481, 482.
[236] 98 F. (2d) 444 (C. C. A. 5th, 1938), *rehearing denied,* 98 F. (2d) 1021 (C. C. A. 5th, 1938).

sions of law to its "Review Division," which findings of fact and conclusions of law were adopted without further inquiry or investigation. Respondent also filed interrogatories for discovery[237] to be answered by the three members of the Board. The Board objected to the interrogatories on the ground, among others, that the allegations were vague, and not shown to be based on reliable information, and therefore, constituted a "fishing expedition."[238]

The court pointed out that in determining the validity of the order, it is bound to consider the Constitution and the statutes as they affect the order and touch the manner of its making, as distinguished from the correctness of its conclusions, for the very fact that the Board's findings of fact are to be conclusive, makes it "all the more necessary that they be made with fairness and according to the safeguards established by law."[239] Reference was then made to the first *Morgan* case; of it the court said:[240]

"What was there said as to the kind of hearing and consideration which an administrative agency must give to a matter where the order is to be conclusive of the facts applies here. Congress has committed the ascertainment of the facts to the Board, and those persons whose character and experience and attainments have been considered such as to warrant appointment to it by the President and confirmation by the Senate ought to ascertain them. If they do not, there is no real finding of facts by the Board; there is no legal basis for an order of the Board."

Consequently, the allegation having been made that the Board did not judicially consider the evidence, but adopted findings made by subordinates, the court concluded that the method of making the order ought to be inquired into before undertaking to enforce the order. The Board was ordered to file answers to the interrogatories.

It is interesting to note, in view of the fact that in the two cases just discussed the orders were attacked as invalid on the ground that the findings of subordinates were adopted by the administrative agency, the contrary argument was advanced in another case. In *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Company*,[241] complaint was made that the Commission did not adopt the recommendation of its examiner. The court said: "But the

[237]Under Equity Rule 58, 28 U. S. C. A. following § 723.
[238]98 F. (2d) 444, 446 (C. C. A. 5th, 1938).
[239]*Id.* at 446.
[240]*Ibid.*
[241]289 U. S. 266, 285, 286 (1933).

Commission had the responsibility of decision and was not only at liberty, but was required to reach its own conclusion upon the evidence."

While it is quite clear that a fair hearing has not been given if the one who determines the facts which underlie the order has not considered the evidence, it does not follow that the administrative agency must consider all the evidence, or that it cannot avail itself of the services of subordinates, even to the extent of referring the record to a Review Division for analysis and a report of proposed findings of fact and conclusions of law. The findings and conclusions may even be adopted by the Board, provided the Board considers the evidence before adopting the findings and conclusions. In such case, the Board has exercised the quasijudicial power conferred, and the findings are, in reality, the findings of the agency to whom the ascertainment of the facts has been committed by the legislative body.

In *National Labor Relations Board v. Biles Coleman Lumber Company,*[242] the Board had petitioned the Circuit Court of Appeals for enforcement of its order, and the respondent pleaded, as an affirmative defense, that the Board's order was made in proceedings in which due process had been denied. The company alleged,[243] upon information and belief, that prior to the hearing before the Board and thereafter, no member of the Board " 'read all of the testimony in the case, or read or examined all of the exhibits filed or read a sufficient portion of the testimony and exhibits to be competent to judicially appraise and weigh the evidence or to form a basis for the findings of fact, conclusions of law, and order.' " It was also alleged that the " 'Findings of Fact, Conclusions of Law, and Order were prepared by employees or subordinates of the Board and were never, in advance of signature thereof by the Board, submitted to the respondent or its attorneys, and the said respondent was never given any opportunity to object to the form or substance thereof.' "

It is to be noted that the allegation differs materially from the allegation in the *Morgan* case and the *Cherry Cotton Mills* case. In those two cases the allegation was that the administrative agency had not considered the evidence before issuing the order. Here the allegation is, in effect, that the administrative board had not *sufficiently* considered the evidence; and the question presented is whether an allegation that an administrative body has not suffi-

[242] 98 F. (2d) 16 (C. C. A. 9th, 1938).
[243] *Id.* at 17.

ciently considered the evidence before issuing an order, makes a case for judicial investigation. That question the court answered in the negative on the ground that the allegation that no member of the Board " ' read a sufficient portion of the testimony and exhibits to be competent to judicially appraise and weigh the evidence or to form a basis for the findings of fact, conclusions of law, and order, is an allegation of a conclusion of law. There is no allegation of fact as to the amount of testimony which was read to constitute a legal insufficiency for a judicial appraisal as to the weight of the evidence or to form a basis for the findings of fact, conclusions of law, and order.' "[244]

That left the allegation that the Board had not "read all of the testimony in the case, or read or examined all of the exhibits filed." This allegation, the court held, was not an allegation of denial of due process, not only because the Supreme Court had held in the *Morgan* case[245] that "evidence, thus taken may be sifted and analyzed by competent subordinates", but also because reading of all the evidence would, under certain circumstances, be unnecessary. For example, the brief submitted by respondent may have made admissions making it unnecessary to read all of the thousands of pages of evidence that may be offered.

Another court has said:[246]

"We do not understand that it is indispensable that the Board members shall have heard the evidence delivered or shall have read it all. Their case is much like that of a busy chancellor. If the evidence has been taken, and the opposing parties appear and argue the case fully, so that the disputes of fact are clearly defined, there is need to read and consider only the evidence bearing on the disputes, other facts being taken as the parties concede them."

It appears quite reasonable and necessary to demand that those, upon whom responsibility has been placed, shall assume that responsibility. If the important fact-finding function is delegated to a Commission, judicial inquiry into the question whether the law has been complied with, should be made, otherwise the statute becomes a nullity. On the other hand, to permit judicial inquiry into the extent or sufficiency of the administrative tribunal's consideration of the evidence seems as undesirable as it is unnecessary. To require

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[244]*Ibid.*

[245]298 U. S. 468, 481 (1936).

[246]National Labor Relations Board v. Cherry Cotton Mills, 98 F. (2d) 444, 446, 447 (C. C. A. 5th, 1938).

a board to show not only the fact that it considered the evidence, but also the extent and sufficiency of its investigation of the record, would impose a burden which would make it doubtful whether members of administrative boards or commissions could effectively perform the duties imposed upon them.

It is not argued that administrative procedure should be free of any of the usual safeguards which control the judicial process, but it is contended that there would be no justification for imposing a heavier burden upon the administrative than is imposed upon strictly judicial bodies. According to the traditional concept of due process with respect to strictly judicial procedure, a party is entitled to a hearing before the court, but no method is provided by which the litigant may inquire into the court's subsequent consideration of the case and the extent to which the record has been examined and the evidence considered. If such procedure is not permissible where a strictly judicial body is concerned, it should not be permissible where a quasijudicial agency is involved. Where it can be shown that the administrative officer or agency has considered the argument or evidence, the only question for judicial determination is whether the order is supported by the evidence; this in accord with the established rule that findings of a quasijudicial officer can be attacked only by showing that the findings are not supported by substantial evidence.[247]

Rehearing Not Essential

It is well settled law that a hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, satisfies the requirements of due process of law. Rehearings, or new trials, are not essential to due process either in judicial or administrative proceedings.

In *Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus*,[248] a statute which granted to the taxpayer a right to be heard on the assessment of his property before final judgment, was involved. It was urged that the valuation, as fixed, was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of possible errors. Of this contention the court said:[249]

[247]Interstate Commerce Commission v. Louisville & Nashville Ry., 227 U. S. 88 (1923); Tagg Bros. & Moorhead v. United States, 280 U. S. 420 (1930).
[248]154 U. S. 421 (1894).
[249]*Id.* at 426, 427.

"If by this we are to understand counsel is claiming that there must be notice and a hearing after the determination by the assessing board as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect. . . . If a single hearing is not due process, doubling it will not make it so. . . ."[250]

Of course, the right to a rehearing may be conferred by statute. A statute providing for rehearing in administrative proceedings, would serve the same purpose as a statute providing for a motion for a new trial in judicial proceedings; it would afford opportunity to correct errors, or to hear newly discovered evidence before an appeal.[251]

Findings

A statute conferring quasijudicial powers upon an administrative officer, or commission, may provide that the findings of fact of such person or commission shall be conclusive if supported by "substantial evidence"[252] or if supported by "testimony,"[253] or if supported

[250]"Nor can the withholding, if it be withheld, of an appeal effect the question of due process. An appeal simply means a second hearing; and if one hearing is not due process of law, doubling it cannot make it so." Montana Co. v. St. Louis Mining and Milling Co., 152 U. S. 160, 171 (1894). *Accord*: Reetz v. Michigan, 188 U. S. 505 (1902); James v. Appel, 192 U. S. 129 (1904); United States v. Heinze, 218 U. S. 532 (1910). *Cf.* A. T. & S. F. Ry. v. United States, 284 U. S. 248 (1932); United States v. Northern Pacific Ry., 288 U. S. 490 (1933); B. & O. Ry. v. United States, 298 U. S. 349 (1936).

[251]Under the Bituminous Coal Act of 1937 [50 STAT. 72 (1937, 15 U. S. C. A. § 829 (Supp. 1939)] a limited right of review is provided. The National Bituminous Coal Commission of seven members is given the right to establish divisions, each of which shall consist of not less than three of its members, and each such division is given the right to exercise all the powers and authority of the Commission, provided that any person in interest may, upon written petition, secure a review by the Commission of the report, finding, or order of such division.

The Federal Communications Commission of seven members is also given the authority to establish divisions of not less than three members, and any action or order shall have the same force and effect as if made by the Commission. The Commission is given the discretionary right to grant a rehearing whether the action or order issued from a division or the Commission itself. 50 STAT. 189 (1937), 47 U. S. C. A. § 155.

[252]Communications Act of 1934, 48 STAT. 1064 (1934), 47 U. S. C. A. § 151 (Supp. 1939) as amended by 50 STAT. 189 (1937), 47 U. S. C. A. § 151 (Supp. 1939).

[253]The findings of the Federal Trade Commission "as to the facts, if supported by testimony, shall be conclusive." 38 STAT. 717 (1914), 15 U. S. C. A. § 41.

by "evidence."[254] When a statute confers power upon an administrative agency, and makes the exercise of the power dependent upon full hearing and findings of fact concerning the subject-matter inquired into, the provision has been held by the courts to constitute an imperative requirement that the administrative body make findings of fact upon the principle issues of the case; and such findings must be specific enough to enable the court to review intelligently the decision of the agency and ascertain if the facts on which the agency has based its order afford a reasonable basis for it. Only in this way is adequate opportunity afforded to secure judicial protection against arbitrary action. If the rule were otherwise the power conferred by the statute could be arbitrarily exercised, since the administrative body could merely recite the ultimate fact upon the existence of which its power to issue an order was to depend. For example, if the power of a commission to issue a rate order depends upon its finding that an existing rate is unreasonable, and the new rate is reasonable, the commission, after hearing, might issue an order setting a new rate, after reciting that it has found the existing rate to be unreasonable and the new one which is ordered to be reasonable. If such procedure were to be allowed, it would be impossible for the reviewing court to determine whether the order of the commission is arbitrary or within its authority. The conclusion of the tribunal may have been in fact justified, but the court would have no way of knowing it. Under such circumstances the court would have to surrender its duty to enforce the law, or would have to substitute its own conclusion upon matters which have been entrusted to the administrative body.

The basis of the requirement is well stated in *Saginaw Broadcasting Company v. Federal Communications Commission*,[255] where the court said:[256]

"The requirement that courts and commissions acting in a quasijudicial capacity shall make findings of fact is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extra-legal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the

[254]The findings of the National Labor Relations Board "as to the facts, if supported by evidence, shall be conclusive." 49 STAT. 449 (1935), 29 U. S. C. A. § 151.

[255]96 F. (2d) 554 (App. D. C. 1938).

[256]*Id.* at 559.

reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or on the contrary, upon arbitrary or extra-legal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact, the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions, as it is in respect of courts."

The findings which must be made have been described as the "basic or essential findings,"[257] and the facts which must be found have been variously described as "pivotal facts"[258] and "basic or quasijurisdictional facts."[259] Such facts are to be distinguished from the "ultimate facts" which are usually stated in the language of the statute. For example, before the National Labor Relations Board may issue a valid cease and desist order, it must be of the opinion, after notice and hearing, that the person has engaged in one of the unfair labor practices designated in the Act. An affirmative finding on this point would be a finding of ultimate fact. Such a finding of itself, as previously pointed out, is not sufficient. There must be a finding of the basic facts, and these facts, as found by the administrative body, must support the finding as to the ultimate fact. The reviewing court can then ascertain whether the facts so found have any substantial support in the evidence, and if so, whether the facts, as found, support the order.

In *Florida v. United States*,[260] the order involved was issued by the Interstate Commerce Commission, and required a railroad to raise its intrastate rates on shipments of logs in Florida. The Commission based its power to make the order upon Section 13 (4) of the Interstate Commerce Act,[261] and made a general finding in the language of that section of the statute, that the intrastate rates

[257]Florida v. United States, 282 U. S. 194, 215 (1931).
[258]Baltimore & Ohio R. R. v. United States, 22 F. Supp. 533, 537 (N. D. N. Y. 1937).
[259]United States v. B. & O. R. R., 293 U. S. 454, 464 (1934); United States v. Chicago, M., St. P. & P. R. R., 294 U. S. 499, 504 (1935); Morgan v. United States, 298 U. S. 468, 480 (1935); Tri-State Broadcasting Co., Inc. v. Federal Communications Commission, 96 F. (2d) 564 (App. D. C. 1938).
[260]282 U. S. 194 (1930).
[261]41 STAT. 484 (1920), 49 U. S. C. A. § 12.

in force before the order, resulted in "unjust discrimination against interstate commerce". The court pointed out that the Commission had made no findings as to the revenue which had been derived by the carrier from the traffic in question, nor which would reasonably be expected under the increased rates, and made no finding that the alteration of the intrastate rates would produce additional income necessary to prevent an undue burden upon the carrier's interstate revenue. In holding the order invalid, the court said:[262]

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the commission's determination, to the importance of which this court has recently adverted . . . but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

In *Saginaw Broadcasting Company v. Federal Communications Commission*,[263] the purpose and necessary content of findings of fact under The Communications Act was considered. The Act[264] provides that the Commission may grant a construction permit for a radio station, if public convenience, interest, or necessity will be served, and, in case of a denial of an application for a construction permit, an appeal may be taken to the United States Court of Appeals for the District of Columbia. The review is limited to questions of law, and findings of fact by the Commission, if such findings be supported by substantial evidence, shall be conclusive unless they shall clearly appear to be arbitrary or capricious. As to the content of the findings required by the Act, the court said:[265]

"In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a Commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature

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[262]282 U. S. 194, 215 (1930).
[263]96 F. (2d) 554 (App. D. C. 1938).
[264]See note 252 *supra*.
[265]96 F. (2d) 554, 559 (App. D. C. 1938).

must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion. For example, before the Communications Commission may grant a construction permit it must, under the statute, be convinced that the public interest, convenience, or necessity will be served. An affirmative or negative finding on this topic would be a finding of ultimate fact. This ultimate fact, however, will be reached by inference from basic facts, such as, for example, the probable existence or non-existence of electrical interference in view of the number of other stations operating in the area, their power, wave length, and the like. These basic facts will themselves appear or fail to appear, as the case may be, from the evidence introduced when attentively considered.

"Thus, upon the issue of electrical interference evidence may be introduced concerning power and wave length of a proposed station and of existing stations, and expert opinion based upon this evidence may be offered as to the likelihood of interference; and expert opinion based on evidence of field measurements of signal strength of existing stations may also be offered. The testimony may conflict. It is the Commission's duty to find from such evidence the basic facts as to the operation of the proposed and present stations in respect of power, wave length, and the like, and whether or not electrical interference will result from the operation of the proposed station, and then to find as an ultimate fact whether public interest, convenience, or necessity will be served by granting or not granting the application."

It may be that, although there is conflicting evidence, there is evidence which would support the ultimate finding. This, however, does not excuse a commission from its duty to make the basic findings as the result of its consideration of that evidence. It is not the duty of the court to make findings for the commission. "The court will not search the record," said Mr. Justice Butler, in *Atchison, T. & S. F. Ry. v. United States*,[266]" to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained."

[266]295 U. S. 193, 201, 202 (1935).

Evidence Necessary to Sustain Findings

If, then, findings of the basic or quasijurisdictional facts are conclusive if supported by evidence, it becomes necessary and important to consider the nature of the evidence required to sustain the findings. This necessarily involves the preliminary question as to whether an administrative agency is bound by the technical rules of evidence which govern strictly judicial proceedings. The Supreme Court in the case of *Interstate Commerce Commission v. Baird*,[267] in a now famous dictum,[268] expressed the opinion that:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof."[269]

The opinion there expressed was accepted in later cases, and it is now well established that administrative agencies are not bound by technical rules as to the admissibility of evidence.[270] Occasionally it is provided by statute, as in the National Labor Relations Act,[271] that "the rules of evidence prevailing in courts of law and equity shall not be controlling". It follows, therefore, that the admission by an administrative tribunal of matters which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, does not invalidate the proceedings. The Supreme Court has recently said:[272]

"The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order."

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[267]194 U. S. 25 (1904).

[268]STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933) p. 20.

[269]194 U. S. 25, 44 (1904).

[270]Interstate Commerce Commission v. Louisville & Nashville Ry., 227 U. S. 88 (1913); United States v. A. & S. R. R., 265 U. S. 274 (1924); Northern Pac. Ry. v. Dept. of Public Works, 268 U. S. 39 (1925); Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268 (1926); Tagg Bros. & Moorhead v. United States, 280 U. S. 420 (1930); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

[271]49 STAT. 449 § 10b (1935), 29 U. S. C. A. § 151 (Supp. 1939).

[272]Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

Does it necessarily follow that, because a commission may, in its discretion, admit any evidence that is offered and which would be inadmissible in strictly judicial proceedings, its order based solely on such evidence would be valid? Perhaps a clue to the answer is to be found in a statement by the Supreme Court in *Interstate Commerce Commission v. Louisville & Nashville R. R.*:[273]

"The Commission is an administrative body, and, even where it acts in a quasijudicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. . . . But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

It is to be noted that the permissible liberality is in regard to the *admissibility* of evidence. It is not suggested that administrative bodies, any more than judicial bodies, may determine the right of the parties upon evidence having no probative value. The question, as to the nature of the evidence required, must be considered in connection with a statutory provision that findings of fact shall be conclusive if supported by evidence, or by substantial evidence, or by testimony.

The National Labor Relations Act provides that in proceedings before the Board, the rules of evidence prevailing in courts of law or equity shall not be controlling.[274] It also provides that the findings of the Board as to the facts, if supported by evidence, shall be conclusive,[275] and this has been held to mean "if supported by substantial evidence".[276]

In *National Labor Relations Board v. Bell Oil & Gas Company*,[277] the validity of an order was attacked in the Circuit Court of Appeals on the ground that one of the Board's findings rested upon hearsay and non-expert opinion evidence. The court, after referring to the statute providing that the findings of fact of the Board, if supported by evidence, shall be conclusive, took the position that, al-

[273] 227 U. S. 88, 93 (1923).
[274] § 10 (b).
[275] § 10 (e).
[276] Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142 (1937). Here the court said, at page 147: "In the case of statutory provisions like Section 10 (e) applicable to other administrative tribunals, we have refused to review the evidence or weigh the testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by *substantial* evidence." (Italics added.)
[277] 98 F. (2d) 406 (C. C. A. 5th, 1938), *petition for rehearing denied*, 98 F. (2d) 870 (C. C. A. 5th, 1938).

though there was no limitation in the statute as to the character of the evidence necessary to support the findings, it would be unreasonable to think that irrelevant or immaterial or incompetent evidence would meet the requirements. The court found support for its conclusion in the same paragraph of the statute which provides that the Circuit Court of Appeals may order additional evidence to be taken before the Board, upon a showing to the satisfaction of the court that such additional evidence is *material* and that there were reasonable grounds for failure to adduce it at the hearing before the Board. Therefore, even though the statute provides that the rules of evidence prevailing in courts of law or equity shall not be controlling, the provision that additional evidence shall be accompanied by a showing that it is material, indicates the intention of Congress with reference to the nature of the evidence required to support the findings of the Board. The court could see no intention on the part of Congress for the court to consider only material evidence in the one instance, and a different sort or quality of evidence in the other. Consequently it was determined that, unless supported by relevant and material evidence, the findings of the Board as to the facts are not conclusive. The words of the court, as to the nature of the evidence required, are significant:

"The evidence to support a finding of the Board should furnish a reasonably sound basis from which the facts in issue may fairly be inferred. A good rule for weighing the evidence to ascertain whether it is adequate for the purpose mentioned is to compare it with the evidence necessary to sustain the verdict of a jury upon a similar issue. Such evidence must be substantial."[278]

Thus, it appears that the provision of the statute with reference to the rules of evidence prevailing in courts of law not being controlling, means only that it is not error for the Board to hear incompetent evidence. The provision that findings of fact, if supported by evidence, shall be conclusive, means that the findings to be conclusive, must be supported by competent, relevant, and material evidence.

In *Consolidated Edison Company v. National Labor Relations Board*,[279] the court recognized the right of the Board to admit hearsay evidence, and pointed out that whether the hearsay was too remote to be entitled to credence goes to the correctness of the Board's findings rather than to the constitutionality of its proceed-

[278] *Id.* at 410.
[279] 95 F. (2d) 390 (C. C. A. 2d, 1938).

ings. As to the duty of the court in determining whether the order of the Board should be enforced, the court said:[280] "The question is not whether this court would have reached the same conclusion as the Board, but whether there is evidence to support the Board's findings.[281] We cannot say that the record is wholly barren of evidence to support the charge that they were discriminated against on account of union activities." The Circuit Court of Appeals entered an order of enforcement of the Board's order, and the Supreme Court granted certiorari.[282] Again it was urged that the Board had received hearsay evidence; it was also contended that the Court of Appeals misconstrued its power to review the findings and, instead of searching the record to see if they were sustained by "substantial evidence" merely considered whether the record was "wholly barren of evidence" to support them. There was thus presented to the Supreme Court, the opportunity to determine the nature of the evidence necessary to support findings of fact when the controlling statute provides that the Board's findings of fact are to be conclusive, if supported by evidence, and that the rules of evidence shall not be controlling. The Supreme Court, after pointing out that it had already been determined[283] that the statutory provision "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" means that the findings of the Board as to the facts, if supported by *substantial* evidence, shall be conclusive said:[284]

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[285] We do not think that the Circuit Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence."

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[280] *Id.* at 397.

[281] Citing § 10 (e).

[282] 304 U. S. 555 (1938).

[283] Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, note 276 *supra.*

[284] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

[285] Citing Appalachian Electric Power Co. v. National Labor Relations Board, 93 F. (2d) 985, 989 (C. C. A. 4th, 1938); National Labor Relations Board v. Thompson Products, 97 F. (2d) 12, 15 (C. C. A. 6th, 1938); Ballston-Stillwater Knitting Co. v. National Labor Relations, 98 F. (2d) 758, 760 (C. C. A. 2d, 1938).

There must be substantial evidence to support the findings, even though the statute provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling". The court continues:[286]

"The obvious purpose of this and similar provisions is to free administrative boards from compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. . . . But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

In *Appalachian Electric Power Company v. National Labor Relations Board*,[287] it said:

"The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."[288]

In *National Labor Relations Board v. Thompson Products*,[289] this language is used:

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[286]305 U. S. 197, 229 (1938).

[287]93 F. (2d) 985, 989 (C. C. A. 4th, 1938).

[288]At this point the court referred to Pennsylvania Ry. v. Chamberlain, 288 U. S. 333 (1933) in which case the court, speaking of the function of the trial court in withdrawing a case from the jury, said, at page 343: "And where the evidence is 'so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury' (citing cases). The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but gives scientific certainty to the law in its application to the facts and promotes the ends of justice (citing cases). The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned."

[289]97 F. (2d) 13, 15 (C. C. A. 6th, 1938). This case, the Appalachian case, note 285 *supra*, and the Ballston-Stillwater case, note 285 *supra*, on the point that substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. These cases were also cited with approval in National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292 (1939).

" 'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

"The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustice be wrought."

That the findings must rest upon evidence having rational probative force seems reasonable and necessary, and in perfect accord with the view of the Supreme Court that, while due process of law does not require any particular form of procedure, it does protect substantial rights, whether the rights are to be determined in judicial or quasijudicial proceedings. If due process requires a judgment based on competent evidence in the one case, it also requires an order based upon competent evidence in the other. How else can the Constitution's condemnation of arbitrary exercise of power be made effective, if a reviewing court is powerless to insist upon evidence having rational probative force?

The requirement is particularly justifiable with respect to findings of administrative agencies which enact the role of complainant, prosecutor, judge, and jury. Obviously, only those who favor the policy behind the act creating a Board or Commission and endowing it with powers such as conferred upon the Interstate Commerce Commission, Federal Trade Commission and National Labor Relations Board, will receive appointments to the administrative tribunals. May not a strong conviction as to public policy operate to create a bias that would have the same effect as a bias engendered by some pecuniary interest? If so, the only method of overcoming that bias, and of guarding against arbitrary action, is to insist upon legally competent evidence to support the findings of fact. It has been said[290] that: "The chief objection to the most important administrative agencies exercising judicial functions is the combination of prosecutor and judge. In actual practice, the administrative body may prescribe the regulations; employ inspectors to enforce them;

[290]Vanderbilt, *Administrative Law*, 1 LAW: A CENTURY OF PROGRESS 135.

file complaints against offenders in the language of an outraged plaintiff; ascend the bench, try the cases for violation of the regulations it has made, decide them on the basis of testimony of inspectors it employs; and where it files an opinion sustain in the strictest judicial language the charges it has preferred in the language of an outraged plaintiff."

The union of these functions in one agency has not disturbed the courts as much as it has some of the writers on Administrative Law. The objection was even brushed aside in a case[291] contesting the validity of the Federal Trade Commission Act, as not raising a substantial question. As previously shown, the courts have insisted that the administrative agencies must have regard to those fundamental requirements of fairness, which are of the essence of due process in a proceeding of a judicial nature. The essentials of a full and fair hearing must be maintained, and, with the courts exerting their constitutional power to see that they are maintained, it may be that the dangers alleged to result from the combining of the functions of judge and prosecutor are more imaginary than real; particularly when the courts will refuse to enforce orders of administrative bodies when it appears that such are not supported by competent evidence. It has become well established as a rule of constitutional law that "the right of review to determine whether the findings of the Commission are based upon substantial evidence or whether they are arbitrary, oppressive, and therefore in excess of its powers, and whether the order made is responsive to and justified by such findings, satifies the requirement of due process."[292]

However, because some administrative agencies occupy the dual position of prosecutor and judge, it becomes all the more imperative that such tribunals observe the rudimentary requirements of fair play. Such procedure is necessary not only to the validity of the administrative proceedings but also to the maintenance of public and congressional confidence.[293]

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[291]National Harness Mftrs. Ass'n. v. Federal Trade Commission, 268 Fed. 705 (C. C. A. 6th, 1920), where the court said, at page 707: ". . . The criticism that the statute makes the commission both judge and prosecutor is too unsubstantial to justify discussion . . ."

[292]Arkansas Wholesale Grocers Ass'n. v. Federal Trade Commission, 18 F. (2d) 866 (C. C. A. 8th, 1927), *cert. denied* 275 U. S. 533 (1927).

[293]"Proper administration of the law by governmental agencies . . . requires careful observance of the procedures established by Congress. For the protection of the people generally, to say nothing of the agencies themselves, convenience of administration cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication." Miller, Associate Justice, in Heitmeyer v. Federal Communications Commission, 95 F. (2d) 91, 96 (App. D. C. 1937).

When Finding of Facts Are Conclusive

When findings of fact have been made in accordance with the requirements aforementioned, such findings of fact are conclusive upon the courts, and the review by the courts extends no further than to determine whether the findings are supported by substantial evidence, for, as stated by Chief Justice Hughes in *St. Joseph Stockyards Company v. United States*:[294]

"When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily.[295] In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."

In some cases, however, the courts will insist upon reviewing findings of fact made by the regulatory commissions. The courts will review administrative fact-finding when necessary to the decision of a constitutional question,[296] and according to *Ohio Valley Water Company v. Ben Avon Bourough*,[297] an order of an administrative commission will be held void because in conflict with the due process clause of the Fourteenth Amendment, if the State has not provided a fair opportunity for submitting a constitutional issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.

The constitutional question arises in the review of rate orders. A rate is unconstitutional if it is confiscatory. It is confiscatory if it does not bring in a fair return on a fair valuation of the property invested. In determining the fair value of the property the correctness of the findings of fact are of vital importance. Thus in re-

[294]298 U. S. 38, 51 (1936).

[295]Citing Interstate Commerce Commission v. Louisville & Nashville R. R., 227 U. S. 88, 91 (1923); Virginia R. R. v. United States, 272 U. S. 658, 663 (1926); Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 444 (1930); Florida v. United States, 292 U. S. 1, 12 (1934).

[296]St. Joseph Stockyards Co. v. United States, 298 U. S. 38 (1936).

[297]253 U. S. 287 (1920).

viewing the reasonableness of the rate the courts feel free to examine all the issues of fact entering into the computation, since it is considered as necessary to a full and fair determination of the constitutional issue.

In *St. Joseph Stockyards Company v. United States*,[298] the judicial duty to exercise an independent judgment as to the facts when the issue of confiscation is presented, was emphasized, as well as the principle that no valid statute could be passed to prevent such judicial review. The Supreme Court there said:[299]

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of the limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing the agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly established that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

[298] 298 U. S. 38 (1936).
[299] *Id.* at 51, 52.

The courts will also exercise an independent judgment in deciding whether the administrative agency has correctly determined those facts which are called "jurisdictional". For example, a commission is given authority under an employees' compensation law, to make awards to persons injured while actually employed. Under such an act, the commission's finding that the claimant was actually employed at the time of the injury, is the finding of a jurisdictional fact, and, according to the doctrine of *Crowell v. Benson*,[300] the courts are free to determine for themselves the existence of the jurisdictional fact, even to the extent of permitting a trial *de novo* on the issue. The conclusion rests upon the reasoning that a constitutional issue is involved. Jurisdiction depends on the employer-employee relationship. If it exists, the administrative body has statutory authority, and, therefore, constitutional authority to make an award. If it does not exist, the commission is without statutory authority, and, therefore, the allegation that it does not exist, raises a question as to the constitutional authority of the administrative body.

These propositions, although well settled,[301] have not been established without vigorous dissent[302] and much criticism.[303]

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[300]285 U. S. 22 (1932).

[301]Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920); Prendergast v. New York Tel. Co., 262 U. S. 43 (1923); Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679 (1923); Tagg Bros. & Moorhead v. United States, 280 U. S. 420 (1930); Phillips v. Commissioner, 283 U. S. 589 (1931); Crowell v. Benson, 285 U. S. 22 (1932); State Corporation Commission v. Wichita Gas Co., 290 U. S. 561 (1934).

[302]See the dissenting opinion of Brandeis, J., in Crowell v. Benson, 285 U. S. 22, 65 (1932), Mr. Justice Stone and Mr. Justice Roberts concurring. See also the opinions of Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo in St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 73, 93 (1936). In the latter case it is said per Mr. Justice Brandeis: "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."

[303]Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 HARV. L. REV. 127; Brown, *Functions of Courts and Commissions in Public Utility Rate Regulation* (1924) 38 HARV. L. REV. 141; Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932 80 U. OF PA. L. REV. 1055; Freund, *The Right to a Judicial Review in Rate Controversies* (1921) 27 W. VA. L. Q. 207.

CHAPTER IV

CONCLUSIONS

The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate,—is a power which is vested by the Constitution in the legislature and may not be delegated. But, when the legislature has laid down the fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the legislative purpose as declared by the legislature, and to exercise judicial power in applying the law to existing fact situations when necessary to effectuate the purpose of the legislative body.

If this results in the exercise of a legislative function—the promulgation, by administrative bodies, of rules and regulations having the force and effect of law—and in the exercise of the judicial function, it must be justified on the ground of necessity; that complex problems continually arise which demand solution, and that result can no longer be achieved properly except by delegating important functions to administrative officials and tribunals. But, however compelling the reasons for regulation of enterprises for the public good, there can be no justification for a denial, either by Congress or administrative officials, of those fundamental rights which are the birthright of every citizen of the United States—those fundamental rights guaranteed by our Constitution, and preserved to those entitled to its protection, by those principles of fair play developed through the years, tested by time and experience, and which have preserved the purity and integrity of the judicial process.

Under our system of government emergency does not create power, nor does it sanction the proposition that if the end be legitimate, it may be accomplished by any means, arbitrary or tyrannical. On the contrary, if the end be legitimate, it may be accomplished by legitimate means only, and the means are legitimate, if, and only if, constitutional authorization may be found for the adoption of such methods.

In the development of our liberty, as Mr. Justice Brandeis has said, insistence upon procedural regularity has been a large factor, and this insistence by the courts, inspired by the Constitution, has resulted in the promulgation of principles of law designed for the protection of the rights of those who become involved in litigation.

Due process of law, guaranteed by the Fifth and Fourteenth Amendments, preserve to the person certain fundamental rights; results in the establishment of principles which were deemed essential in order to assure justice before the law. These rules were binding on the courts because adherence to them was felt necessary in order to preserve, in judicial trials, those rights guaranteed by the Constitution; consequently may be said to have a constitutional basis.

If, then, certain principles governing judicial procedure and pertaining to trials by the courts, are deemed to be so necessary for the protection of rights as to be required by he Constitution, and therefore, binding upon the courts, an incongruous result would certainly be obtained if the conclusion were to be established that rights guaranteed by the Constitution may not be denied by the courts, but may be denied by administrative tribunals. If the right is so fundamental as to have a constitutional basis, that right should be preserved against onslought from any direction, and from any source, be it administrative or judicial.

In the course of this study relating to the legal aspects of administrative hearings and findings, there have been set forth those principles which have been judicially declared as mandatory for the preservation of rights, regardless of whether the judicial or the administrative process is involved. That these rules, or any of them exist, is not surprising. That an administrative officer or tribunal "appointed by law and informed by experience" should transgress, let alone deny, these "concepts of fair play" is not only surprising, to say the least, but also is cause for regret, as it results in public distrust of a process essential to the proper exercise of governmental authority.

The preceding chapters have clearly demonstrated that while the Constitution is a flexible instrument, it does contain limitations; that the judicial branch of our government is showing no disposition to abandon its high place in our constitutional system of government. They also indicate that those principles of law, applicable whether judicial or administrative proceedings are involved, pertaining to administrative hearings and findings, and designed to require procedural regularity, are not arbitrary rules designed by one branch of the government for the purpose of hampering or embarassing the activities of another branch with which it is, allegedly, not in sympathy. On the contrary, they are rules made necessary in order to preserve rights guaranteed by the Supreme

Law of the Land, and to deny short-cuts to a certain end, even though the end be legitimate, when the sanction of a short-cut would result in the by-passing of constitutional rights.

Much of the criticism that flows so freely today with respect to adminisrative agencies may be avoided if the legislature would pay more attention to the careful drafting of laws pursuant to which the tribunal is to act, and if the administrative agency would pay more attention to the principles which have been promulgated for their guidance by the courts acting under and pursuant to constitutional authority. The latter is manifestly to their own interest, for, as the Supreme Court has had occasion to say, "if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." If they do no do so act, the resulting loss of congressional and public confidence must necessarily have an effect with respect either to the personnel of the tribunal, or its powers.

The maintanence of these standards, proper observance of the principles applicable to administrative hearings and findings, will mark the end of justifiable criticism of those charged with administrative functions. The only criticism that will then remain will be that of those hostile to the administrative process solely because of a prejudice against governmental regulation, or of those who dislike the policy of the law, the administration of which is entrusted to the regulatory commission. With such criticism the administrative agencies need not be concerned, for not only is that a problem over which they have not control, but also the Constitution does not guarantee against governmental regulation, within certain limits, nor does it require that the validity of governmental policy depend upon the approval of all who would be affected by it.

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STATE BAR SECTION

SUGGESTIONS FOR THE PREPARATION OF BRIEFS*

There are three objects in the proper preparation and arrangement of a brief, assuming that the lawyer knows his case and the law applicable thereto, so far as the merits of the case are concerned. The main object is that the appellate court may be aided by the special learning of the lawyer in the case, which he is presumed to have derived from a study of that particular case for some time, accentuated by the interest he has in rendering his best service to his client. The second object is, of course, that he may in the interest of his client present the law and the facts as strongly and as persuasively as may be, while at the same time maintaining a true fidelity to the facts of and within the record, and the law applicable thereto. The third requisite, and one which is often overlooked, is that the brief may be so prepared and arranged that the judge or judges who read the record and the briefs, before the conference upon the case, may be able, by the aid of the briefs, to put the case before the associate judges in conference in such a way as that no point touching a material fact or issue will be overlooked and that no case in point would fail to be called to the attention of the associate judges.

This latter is hard to do with some of the briefs which are filed. The material points are not separately analyzed; the authorities are scattered throughout the brief without any attempt to gather them in such a way that the judge or judges who are putting the case to their associates may reach them readily; the facts and the law are often intermingled in such a fashion that it is difficult to tell precisely what is being urged, and whether of law or of fact. Instead of carrying its own analysis, as a brief ought to do, the judges or some of them must sometimes take the brief and by marginal notes on it, or by notations separately made by the judge or judges, try to point out and indicate what the points are, and, by these marginal or separate notes, to get it in such shape that it can be put in conference, point by point. But a brief so constructed as to require this to be done entails such a large amount of additional labor on the part of one or more of the judges that sometimes it must inevitably be true that neither they nor their associates will get the full or precise import of what is being urged upon the court.

For these reasons, a brief should be arranged in approximately the following manner:

On the first or opening page of the brief there should be written the style of the case, its docket number and the statement in whose behalf the brief is filed, and this is to be immediately followed by a:

*Prepared and distributed by the Supreme Court of Mississippi.

Topical or Subject Index

This index is a concisely stated summary of each of the law points which the brief maker will urge before the court. Point I will be a concise statement, in one paragraph, if possible, of what that point is, and immediately following thereunder will be a list of every case or the citation of every text or statute which the brief maker is relying on in support of that point. Point II briefly stated will follow, and all the cases, texts or statutes which will be relied on in support of that point will be indexed thereunder, and so on through all the points. The index under each point will show the style of the case, the book and page where reported, and the page or pages in the brief where that case will be subsequently mentioned; and the same as to textbooks and statutes.

In referring to Mississippi cases, the official reports must be cited, since these are the reports which the Court regularly uses and must cite in the opinions. Unless the brief uses the official reporter citations, one of the judges will be obliged to make the translation, and this is clerical work which the brief maker has no right to call on the judges to do.

Introductory

Beginning at the top of the next page following the close of the index, the style and docket number, and in whose behalf the brief is filed may again be stated, and this is followed by a brief introductory giving the nature of the case, as for instance: "This is an action of ejectment, wherein the principal point in controversy is the question of adverse possession", or "This is a suit to set aside an alleged fraudulent conveyance, and among others the defense was that the grantor was not indebted to the complainant". This is not to be a statement of the case, for that feature comes later, but is only to give the court a quick glance at what the case is about, and, save in rare cases, ought not to be in more than one or two short paragraphs.

The Pleadings

The introduction is followed by a concise outline of the pleadings, if any point is to be made in regard to the state of the pleadings. More often than otherwise no point arises out of the pleadings, in which case the pleadings feature may and ought to contain only a brief reference to the pleadings, with the statement that there is no controversy under this head. At this point there should be stated the gist of what was done with the case in the trial court.

Statement of The Facts

Next following the pleadings feature is the succinct statement of the facts of the case, so far as essential or proper to a correct understanding of the questions presented for determination. This is not to be done by any extended question and answer quotation from the testimony, but by a clear, concise and accurate narrative

of the outstanding, pertinent facts, giving only such details as illustrate or disclose the precise import of the leading facts; and always there should be inserted the page or pages of the record which support or bear out each item of the assertion of the facts. Sometimes questions and answers may be quoted from the record, but this should be done only when the particular questions and answers go at once to the heart of the case, or of the particular point and are not lengthy.

While the statement of facts should not extend to a greater length than necessary to put every really important and pertinent fact before the court, yet, above all else, the statement of the facts should be accurate, and inaccuracy may occur in omitting a fact or facts which are of importance. Lengthiness is not to be avoided at the expense of accuracy; and whatever the length, the statement must be true to the facts, for if the court finds that the statement of the facts is distorted or misleading when checked and compared with the record, it may cause a serious loss of confidence in the brief as a whole. The statement should pursue an orderly and logical plan, and when this is done length is not in itself objectionable if the mingling of material and immaterial facts, and verbosity or discursiveness, are avoided.

The Argument

The statement of the facts is then followed by the full argument, point by point, according to the points as shown in the topical index. The authorities cited in the index are here taken up, and their application to the facts is shown; and it is of valuable aid, in most cases, to quote pertinent excerpts from the opinions in the cited cases and from the text books,—provided the quotations are not too lengthy; and provided, of course, the quotations are not misleading when taken apart from the remainder of the opinion or text. Frequently, in order to make the quoted words or holding of the Court intelligible it will be helpful to state the facts of the cited case. This statement should be concise and clear, setting forth accurately only such of the facts as bear on the proposition of law for which the case is cited. This course is of particular service for the work in conference, when the quotations from the cases and texts may be read to all the judges in the convenient form furnished by the briefs, and where, when a case thus cited seems particularly in point, the book itself may be taken down and read by or in the hearing of the associate judges.

Sometimes the facts of a case will permit that instead of stating all the facts before entering upon the argument, the several points of law may be taken up in the order shown in the topical index, and the facts as applicable to each point may be stated thereunder and the argument on the law addressed thereto, and thence in the same order through all the points, thereby separating the statement of the facts according to the several law points. When

this can be done, without detriment to the continuity of the argument, and without repetition, it is often more helpful to follow this course, particularly when some one point might be decisive of the whole case.

Next following the main argument, there may be the argument in answer to the contention of the other side as made in the trial court, and by way of anticipation of what the other side will probably say in the appellate court; or if the brief is for the appellee or is a reply brief by appellant, an argument in response to that contained in the previous briefs. Whenever in any reply brief, supplementary points of law are relied upon, these should be carried back into the topical index together with the subjoined index of the authorities in support thereof in the same manner as in regard to the original points of law.

Conclusion

Such additional features than those above-mentioned may be incorporated according as counsel may deem advantageous, and there is the concluding summary in such terms as the brief maker may consider appropriate and helpful.

It is sometimes supposed that appellate judges, or some of them, object to long briefs. This depends on the character of the brief and whether it bears evidence that the brief maker has thoroughly studied his case both on the law and the facts,—whether in what he says he is actually aiding the court instead of putting useless labor on the judges. If the case is important in the principles involved or is close upon the law the brief will be read more than once, and if not burdensomely constructed will often be sent around to all the judges in turn so that they may read it in advance of conference and sometimes after conference, and the judge who writes the opinion will want everything in it right before his eyes in that final stage of its consideration. Thus the brief and argument should be convenient not only, but inviting to its repeated consideration and study. A brief too long, whatever else may be said about it, is not inviting. But long briefs are necessary in some cases, and at last, counsel must have the privilege to determine for himself how lengthy his brief shall be.

The above suggestions follow closely upon the outline set forth in Rule 27 of the Rules of the Supreme Court of the United States, and are founded upon the same reasons, as learned through the lessons of long experience in the work of appellate review. But what has been said herein are suggestions only; the Supreme Court of Mississippi has never adopted any mandatory rule, and does not expect to do so at any early date. Paragraph 2 of our Rule 7 is advisory and not obligatory. Counsel are at liberty, therefore, to adopt only such parts of the above suggestions as they may desire, but it is hoped that, at least, the feature of the topical and case index will soon come into general use.

The article by Judge W. D. Anderson in[2] *Mississippi Law Journal* 263, when available to counsel may be read in connection with and as a part of these suggestions.

CONSTITUTIONALIZING THE REQUISITES OF THE OFFICE OF COUNTY JUDGE

*Lunsford Casey**

The judicial power of the State of Mississippi is vested by the state Constitution in a number of courts.[1] It is well-known among the practitioners of the state that of these courts, two try the majority of the cases filed, these being the Justice of the Peace Court and the Circuit Court. In view of this fact and other attendant circumstances[2] the legislature, pursuant to constitutional authority,[3] established the county court.[4]

It was vested with jurisdiction concurrent with the Justice of the Peace Court in all matters civil and criminal and concurrent jurisdiction with the Circuit and Chancery Courts in all matters of law and equity wherein the amount of value of the thing in controversy does not exceed one thousand dollars. In addition it was given exclusive jurisdiction in matters of eminent domain, the partition of personal property, and in actions of unlawful entry and detainer.[5]

It may be seen that the scope of authority thus given to the County Court will enable it to become a center of litigation, especially since matters will be disposed of much more quickly than formerly, due to the frequent sessions of court.[6]

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*LL. B. Univ. of Miss. (1936); Member, Miss. State Bar; United States Attorney, Lands Div., Dept. of Justice, Washington, D. C.

[1]These include: (1) The Supreme Court, MISS. CONST. (1890) § 144;
(2) The Circuit Court, MISS. CONST. (1890) § 152;
(3) The Chancery Court, MISS. CONST. (1890) § 152;
(4) The Justice of the Peace Court, MISS. CONST. (1890) § 171;
(5) "Such other inferior courts as may be necessary", MISS. CONST. (1890) § 172.

[2]Inasmuch as the Circuit Court meets only twice a year in some of the counties, a number of the court dockets became clogged with litigation. In some instances petty criminal sentences, appealed without bond, were served before the next term of court. It was to alleviate these conditions that this legislation was enacted.

[3]MISS. CONST. (1890) § 172.

[4]Miss. Laws (1926) c. 131; MISS. CODE ANN. (1930) §§ 693-708.

[5]Miss. Laws (1926) c. 131; MISS. CODE ANN. (1930) § 693. See also § 698, which sets forth the powers of the county judge.

[6]MISS. CODE ANN. (1930) § 702 provides that county court terms shall be held monthly and in counties having two circuit court districts it shall be held monthly in each district. Special terms may also be held upon the giving of requisite notice.

The establishment and maintenance of this branch of the judiciary should be recognized as a progressive movement, beneficial to all who have occasion to make use of the courts. It is with these things in mind that the problem at hand is approached.

Although the court was established pursuant to constitutional authority the legislature exceeded its constitutional limitations in one phase when it enacted certain requirements as to the qualifications of the County Judge.

> "The county judge shall possess all the qualifications of a circuit judge as prescribed by the State Constitution . . ."[7]

The reference made is to Mississippi Constitution 1890, Sec. 154, as follows:

> "No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state."

It is conceded that every judge who is elected in the State of Mississippi should be required to possess such qualifications as above stated in the interests of justice and the public welfare. And any person who is selected to fill the office of county judge should likewise possess such qualifications. However, it is provided in the State Constitution that: "All qualified electors and no others, shall be eligible to office, except as otherwise provided in this Constitution."[8] The qualifications for circuit judges are provided for by the Constitution but nowhere therein is mention made of the office of county judge. It, therefore, logically follows that anyone who aspired to this office might become a candidate provided he or she is a qualified elector, *only*. One need not be a practicing lawyer or even a lawyer for that matter. Twenty-one years of age, payment of poll tax, and the other simple requirements of an elector, and anyone's name may be placed upon the ballot. Of course, as a matter of fact, the election commissioners might refuse to comply with the request of a person without the statutory qualifications but this would simply mean that the election would be invalidated when appropriate legal proceedings had been brought.

Substantiating this theory is the case of *McCool v. State* ex rel. *Howie, Dist. Atty.*[9] In this case, Howie filed a *quo warranto* against McCool, Ross and White, seeking to remove them from office under the provisions of Section 3430, Code of 1906.[10] Defendants

[7]MISS. CODE ANN. (1930) § 697.
[8]MISS. CONST. (1890) § 250.
[9]149 Miss. 82, 115 So. 121 (1928).
[10]MISS. CODE ANN. (Hemingway, 1917) § 5990; MISS. CODE ANN. (Hemingway, 1927) § 7015. The relevant parts of this section are: "The mayor and board of aldermen shall publish on the first of October, annually, a statement showing the amount of taxes and other moneys collected. . . . If there has been

were aldermen of the city of Canton during the term 1925-26 and were re-elected for the term 1927-28, qualified and were inducted into office. It was alleged that the municipal debt was increased without being authorized by a vote of the majority of the qualified electors of said municipality, and that by virtue of the statute, defendants were disqualified to succeed themselves. Defendants set up as a defense, among others, that the statute was unconstitutional as contravening section 250 of the Constitution.

The decision of the court, rendered by Justice Ethridge, is comprehensive and overlooks no angle.[11] Quoting from the opinion:

> "It is argued here, as it was in the Wynn case, that the section was dealing only with constitutional offices; and it is insisted that, as municipal offices were not provided for in the Constitution specifically, but were left to be created by the legislature or abolished by it, the legislature could prescribe the qualifications desired for such offices.
>
> "Does section 250 of the Constitution authorize the legislature, in creating statutory offices, to prescribe additional qualifications therefor? In other words, does the provision of the Constitution here apply to municipal and other statutory offices?[12]
>
> "It appears plain to us from these provisions that section 250 applies to municipal and statutory officers as well as to constitutional officers; and that the constitutional convention enumerated all the cases where, in its opinion, special qualifications are required. The fact that it might be well to require additional qualifications in particular instances cannot affect the construction of the constitutional provision in the light of the decision of the Wynn case, supra. . . . It is true, too, the legislature is free to create additional offices for the public welfare. But it is manifestly intended that, where the Constitution itself had not provided to the contrary, the legislature could not prescribe additional qualifications. As said by

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an increase of taxation as compared with the year next preceding or if the indebtedness of the municipality has been increased during the year, by contract or by ordinance participated in or voted for by the mayor and aldermen, unless the increase be authorized by the electors as provided in this chapter, the mayor and aldermen shall be suspended from office, and the governor shall appoint their successors, who shall hold until the next election and qualification thereunder. *In case of an increase of indebtedness not so authorized, the mayor and aldermen shall not succeed themselves or each other. . . .*" (Italics supplied).

[11]Wynn v. State, 67 Miss. 312, 7 So. 353 (1890) is discussed at length. This case involved the question as to whether or not the legislature could add a qualification, not named in the Constitution, for the office of county superintendent, this office being created by the Constitution. The court held that the qualifications were dealt with by that instrument and the legislature was without authority to add others.

[12]149 Miss. 82, 100, 115 So. 121, 124 (1928).

> Judge CAMPBELL in the Wynn case, 'if the legislature can prescribe additional qualifications, its power is without limit'."[13]

It is submitted that the decision in this case clearly embraces the question as to the constitutionality of the statute prescribing qualifications for the office of county judge. In the light of the holding here and in order to insure that justice will be administered in the county courts by competent judges, it is believed that at the earliest possible moment there should be submitted to the electors an amendment making these requisites for the office of county judge constitutional.

It may be thought that the voters will never elect a man to this office who does not possess the qualifications as stipulated by the legislature. Yet the fact remains that if such an event should take place it would then be too late to think of the propriety of an amendment and if one should then be made it would be like "locking the barn door after the horse is stolen".

REPORT OF THE EXECUTIVE COMMITTEE OF THE JUNIOR BAR SECTION

A joint meeting of the Executive Committee and the chairmen of the various committees of the Junior Bar Section was held in Jackson on April 26, 1940.

The Legislative Drafting Committee reported that its services were offered to the members of both the House and Senate and the staff of the Attorney General of the State of Mississippi during the recent session of the legislature, but that the committee was not called upon. The committee reported that apparently there is no need for the committee. It was suggested that a bill providing for a Legislative Drafting Bureau be prepared and presented to the Junior Bar Section at its meeting in June, and this will be done by the joint action of the Legislative Drafting Committee and the Code Committee.

George Ethridge, Chairman of the Bureau of Identification Committee, reported that the bill providing for the creation of such bureau, which was endorsed by the Junior Bar Section and Mississippi State Bar, was killed in the legislature. This committee plans to rewrite the bill, leaving out certain features that were objectionable to the legislature, and report to the Section at its next meeting.

Both divisions of the Committee on Cooperation with Young Lawyers reported that they were getting out letters to those about to enter the practice, welcoming them, and Division "B" reported that it had made a survey of possible openings in North Mississippi for young lawyers, which will be presented to the Senior Law Class of the University. Division "A" plans to make such a survey in its section of the state.

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[13] *Id.* at 103, 104, 115 So. at 125.

The Committee on Pleading, Practice and Procedure reported that it was the opinion of its members that a course of watchful waiting and a campaign of self education was best in reference to the Federal Rules of Civil Procedure. At the meeting in June this committee will lead in the discussion of several suggested changes which the Commissioners of the Mississippi State Bar are making, for the purpose of preparing the members of the Section to take part in the discussion of these changes at the meeting of the Mississippi State Bar.

The Legislative Committee reported that it had been successful in having enacted several of the changes in statutes proposed by the Code Committee of last year which were approved at the meeting in Biloxi.

The Public Relations Committee advised the Executive Committee that articles were being written with a view of having them published in the newspapers of the state for the purpose of bringing the Bar and the Public closer together. These articles will also advise the public of what constitutes unethical practice of the law.

The Code Committee gave a splendid report with several suggested changes in present statutes which were approved by the Executive Committee. The Chairman, John Morgan Stevens, Jr., reported that the committee was considering several other suggested changes on which the committee had not completed its work. A mimeographed copy of the proposed changes will be mailed each member of the Section prior to the meeting.

June 26, 1940, was the date selected for the meeting of the Section, for the Commissioners set the annual meeting of the Mississippi State Bar for June 27th and 28th. The place, of course, is Jackson. The Executive Committee will meet at 10 A. M., and the first session of the Section will open at 2:30 P. M. At the afternoon session it is planned to dispose of all of the committee reports and the discussions thereon. At 8:00 P. M. the Section will reconvene for an address by an outstanding member of the legal profession, and the last thing on the program will be the election of officers for the new year. The printed program will be mailed to the members prior to the meeting.

It is the desire of the Executive Committee that every member of the Section will make an effort to attend. The meeting is being held in Jackson which is centrally located, and the time of the convention will conflict with very few terms of the various courts over the state. The purposes of the Junior Bar Section can only be carried out through a large attendance and free discussion on the part of the members.

THIRTY-FIFTH ANNUAL MEETING OF THE MISSISSIPPI STATE BAR

Recent meetings of the Program Committee of the Mississippi State Bar, the Board of Bar Commissioners, and the Executive Committee of the Junior Bar Section have resulted in the planning of an unusually interesting program for the Annual Meeting of the Mississippi State Bar which will be held in Jackson on June 26-28, 1940, with headquarters at the Robert E. Lee Hotel.

The Junior Bar Section will hold its annual meeting on Wednesday, June 26th, beginning with an Executive Committee meeting at ten o'clock in the morning. At 2:30 P. M. there will be a business session, and in the evening an address on a subject vital to the interests of young lawyers will be heard. Immediately following this address, the election of officers will be held. Suitable entertainment for the later evening hours has been planned by the young lawyers of Jackson. Mr. Charles A. Sisson of Clarksdale, chairman of the Junior Bar Section, will preside at all meetings of the Section.

The opening session of the Mississippi State Bar will begin at 9:30 o'clock on the morning of Thursday, June 27th. The features of this session will be addresses by the president, Hon. Wm. H. Watkins of Jackson and Hon. Charles E. Dunbar of the Tulane Law School, who will discuss phases of the activities and development of bar associations. At 12:30 P. M. the University of Mississippi Law Alumni Association will hold its annual luncheon with Mr. Harry M. Bryan of Jackson, president of the Law Alumni Association, serving as toastmaster.

On Thursday afternoon a report of the University of Mississippi Law School will be given by Dean T. C. Kimbrough, and concluding Thursday's business program will be an address by Hon. Francis Harmon, of New York, formerly an attorney of Hattiesburg, but now with the Motion Picture Producers and Distributors of America.

The Jackson Country Club will be open for social activities to the members of the bar and guests immediately after adjournment Thursday afternoon. In the evening the annual banquet will be held, followed by a dance. The speaker at the banquet will be Dr. Robert J. Farley of Tulane Law School, formerly a professor of law at the University of Mississippi.

Reports of various bar committees will be heard Friday morning, among these being the report of the Junior Bar Section and the Study Committee. A discussion of proposed rules drafted by the Study Committee, of which Mr. W. S. Welch of Laurel is chairman, and which proposed rules have recently been mailed to each member of the bar, will be of considerable benefit and interest. Following these reports, Mr. Elbert Johnson of Indianola, member of the House of Delegates of the American Bar Association, will tell of the work of the American Bar Association in cooperation

with the State Bar activities. The principal address of the convention will be given by Hon. Thurman Arnold, Assistant Attorney General of the United States, Washington, D. C. Mr. John H. Fox of the University of Mississippi Law School will present Mr. Arnold.

Friday afternoon will be given to the election of officers and selection of place of meeting for the next annual convention.

All those who anticipate attending the convention are urged to make hotel reservations as early as possible because of the crowded condition of the Jackson hotels.

Alice Nevels, Secretary.

NOTES

Master's Tort Liability to Servant in Mississippi

III.

The Simple-Tool Doctrine

Generally the law requires a master to use ordinary diligence to furnish the servant with appliances reasonably suited to the use for which they are intended, and to use like care in inspecting and keeping them in proper condition.[1] However, the courts in a number of states, including Mississippi, have declared that there exists an exception to the above rule in regard to simple tools. Many of the other courts which adhered to the doctrine have suggested that its basis is the broader doctrine of assumption of risk.[2] In Mississippi the decision in *Parker v. Wood Lumber Co.*,[3] the first case dealing with the doctrine, seems to have made contributory negligence the basis for the doctrine. In this case the plaintiff was injured because of a defective cant hook which the defendant had furnished him. The court held that the cant hook was not a simple tool. However, by way of dictum it declared that the simple tool doctrine has no application in any case except where the defect in the simple tool is obvious or patent. The court quoted the rule as set forth in *Shearman & Redfield on Negligence*,[4] as follows:[5]

> "It has been often said that the master is not liable for defects in such things [simple tools] to a servant whose means of knowledge thereof are equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such

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[1]Williams v. Garbutt Lumber Co., 132 Ga. 221, 64 S. E. 65 (1909); Miss. Valley Power Co. v. Hubbard, 181 Ark. 487, 26 S. W. (2d) 118 (1930); Thomas v. Southern Pacific Co., 116 Cal. App. 126, 2 P. (2d) 544 (1931); Wilson & Toomer Fertilizer Co. v. Lee, 90 Fla. 632, 106 So. 462 (1925); Sheltrone v. Mich. Cent. R. R., 245 Mich. 58, 222 N. W. 163 (1928); Southern Drilling Co. v. McKee, 171 Okl. 409, 42 P. (2d) 265 (1935); Hope v. Natchez, C. & M. R. R., 98 Miss. 822, 54 So. 369 (1910); Natalion v. St. Paul B. & T. R. R., 190 Minn. 118, 251 N. W. 9. (1933); Morton Salt Co. v. Wells, 123 Tex. 151, 70 S. W. (2d) 409 (1934).

[2]Meador v. Lake Shore & M. S. R. R., 138 Ind. 290, 37 N. E. 721 (1894); Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56 (1886); Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339 (1887); Hall v. United States Canning Co., 76 App. Div. (4th Dept.) 475, 78 N. Y. Supp. 617 (1902); Borden v. Daisy Roller Mill Co., 98 Wis. 407, 74 N. W. 91 (1898); Southern Ry. v. Hensley, 138 Tenn. 408, 198 S. W. 252 (1917); Nugent Sand Co. v. Howard, 227 Ky. 91, 11 S. W. (2d) 985 (1928); Hedicke v. Highland Springs Co., 185 Minn. 79, 239 N. W. 896 (1931); Swaim v. Chicago R. I. & P. Ry., 170 N. W. 296 (Iowa 1919); Randall v. Gerrick, 104 Wash. 422, 176 Pac. 675 (1918); Nolen v. Halpin-Dwyer Const. Co., 225 Mo. App. 224, 29 S. W. (2d) 215 (1930); Swaim v. Chicago R. I. & P. Ry., 187 Iowa 466, 174 N. W. 384 (1919); Alexander, *Re-Thinking Negligence* (1939) 11 Miss. L. J. 340. See also 39 C. J. p. 761, § 959.

[3]98 Miss 750, 54 So. 252 (1910). See also Notes (1908) 13 L. R. A. (NS) 668; (1912) 40 L. R. A. 832; 18 R. C. L. p. 573 § 74; Berry *The Doctrine of Simple Tools* (1916) 82 Cent. L. J. 28.

[4](4th ed. 1888) § 217.

[5]98 Miss. 750, 755, 54 So. 252, 253.

> means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire."

Thus the court concludes that even in the case of a simple tool, the question comes to this:[6]

> "Did the servant know of the defect in the tool, or ought he to have known of it by the use of ordinary care?"

From the above language we see the court pointing out that the doctrine should apply only in cases where the defect in the tool is patent, and that the circumstances must be such that the servant knew or ought to have known of the defect, thereby making him contributorily negligent if he did not use care to guard against it. The court added:[7]

> "The doctrine so called does not seem to us to be any new doctrine, properly considered, but merely a new application of the very old doctrine of contributory negligence."

Immediately after the decision in the above case, a statute was passed completely abolishing the defense of contributory negligence.[8] Assumption of risk was likewise abolished in cases where the injury results in whole or in part from the negligence of the master.[9] Therefore, it was strongly urged in some of the later cases[10]

[6] *Id.* at 756, 54 So. at 253.

[7] *Ibid.*

[8] Now Miss. Code Ann. (1930) § 511.

[9] Miss. Code Ann. (1930) § 513. It is interesting to note that in the case of Hedicke v. Highland Springs Co., 185 Minn. 79, 239 N. W. 896 (1931) the court held that the master could use the simple tool doctrine as a defense to a suit by the servant, although assumption of risk and contributory negligence had been abolished in cases where the master had not complied with the Workmen's Compensation Statute in the state. For a similar holding see Maher v. Wagner, 62 S. D. 227, 252 N. W. 647 (1934).

[10] For example see the case of Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117 (1923); also Jones v. United Ice Co., 167 Miss. 886, 891, 150 So. 652, 653 (1933). In this case the court said: "The rule of respondeat superior rests upon the assumption that the employer has a better and more comprehensive knowledge than the employee, and, therefore ceases to be applicable, where the employee's means of knowledge of the danger to be incurred is equal to that of the employer; and such is the case where the tool is of such a simple character that a person accustomed to its use cannot fail to appreciate the risks incident thereto." The court admits that in reality the master may not know the workings of a machine which he furnishes the servant, yet the law places a duty on him to inspect. However, in the case of a simple tool, the court says that there is no reason to inspect, ignoring the question of why there is no reason to inspect. Certainly there is need for inspection by someone, and if we say that this is the duty of the servant, then he is contributorily negligent if he fails to do so. But contributory negligence has been abolished as a defense as being against public policy. Therefore, it seems that the legislature and court differ as to what is the best policy.

that since the simple tool doctrine, both in Mississippi and in other jurisdictions, was based on one or both of the common law principles, that it no longer had a basis upon which to stand in this state and should be abandoned. However, regardless of the statutes, the former decision and able arguments of counsel, the court, when it found that a tool was a simple one, continued to hold that the master was not liable because he was under no duty to furnish the servant with a safe simple tool. For example, in *Wausau Southern Lumber Co. v. Cooley*[11] the court said:[12]

> "The master is not under duty, as regards a mere simple tool, to furnish a servant with a safe tool; the servant's knowledge and judgment in such case being equal to that of the master."

The holdings and reasoning of the Mississippi court were commented upon by the Federal District Court sitting in Mississippi, in *Middleton v. National Box Co.*[13] In that case it was pointed out that the court refused to base the doctrine on either or both of the common law principles (assumption of risk or contributory negligence) and that the court must feel that it is a part of the policy of the state to exonerate a master who furnishes a defective simple tool.

Subsequent cases[14] have indicated that another basis for the doctrine in Mississippi is that the servant should repair his own tools. No doubt, historically, this was true to a large extent, but today it is a matter of common knowledge that the master usually has a repair shop and a foreman to inspect and repair tools.[15]

Although it is hard now to find a satisfactory basis for the doctrine, the fact remains that it is deeply imbedded in the jurisprudence of the state. Yet the Mississippi court has found means of avoiding application of the doctrine on occasion. In the first place, the tool involved must be found to be a simple one. An illustration of the difficulty of this decision may be found in *Hercules Power Co. v. Tyrone.*[16] In that case a rubber hose was attached to the boiler of an engine. The connection between the boiler and the hose was defective; when the plaintiff proceeded to use the hose to clean the engine, as was his duty, the hose came loose and the boiling water burned him severely. The court held:[17]

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[11]130 Miss. 333, 94 So. 228 (1922).

[12]*Id.* at 340, 94 So. at 229.

[13]38 F. (2d) 89 (S. D. Miss. 1930).

[14]For example see the case of Mitchell v. Brooks, 165 Miss. 826, 147 So. 660 (1933) where the court said that the light fixture in question was a simple appliance; that the plaintiff knew of the defect as well as the master and that it could have been fixed very easily by the servants.

[15]See Middleton v. Faulkner, 180 Miss. 737, 178 So. 583 (1938). In this case the court gives the historical background of the doctrine, pointing out that in the early days the servant looked after the tools himself, but as machinery became complicated, the law imposed a duty on the master to inspect and repair them. The court said, however, that this duty was not extended back so as to include simple tools. There is no satisfactory reason given for this distinction.

[16]155 Miss. 75, 124 So. 74 (1929).

[17]*Id.* at 87, 124 So. at 77.

> "We do not think the hose here involved can be classed as a simple tool, and the doctrine of simple tools, therefore, has no application here. The hose was attached to the boiler and to be used it had to have water brought from the boiler and played upon the machinery. The boiler and its several parts constituted only one instrumentality, and it would be improper to consider all the several attachments as if they were detached from the boiler with all the machinery to constitute the tool here involved."

The court went further and said that where the machinery is complicated, the fact that the servant may happen to know as much as the master about the instrument does not relieve the latter from furnishing the former with a safe instrumentality. This language would appear to repudiate equal knowledge on the part of the servant as the basis for the doctrine, causing decisions to turn on nothing except the magic word "simple".[18]

The Mississippi court has held that the phrase "simple tool" includes an axe,[19] chisel,[20] track wrench,[21] ice tongs,[22] steel mesh light frame[23] and wedge;[24] and that it does not include a cant hook,[25] hose,[26] stationary step ladder[27] or track jack.[28] An illustration of the arbitrariness of the distinctions is found in the case of *Laurel Mills v. Ward*.[29] Here the plaintiff was injured because of a defective step ladder which the master had furnished him to stand upon. The ladder stayed in practically the same place all of the time. It was contended that the ladder was a simple appliance and the court admitted that there is strong authority supporting this contention,[30] but it held that the ladder here was a part of the place furnished the employees upon which to work and that although the ladder could be moved from place to place, yet here it usually stood in one spot and was thus held to be similar to a movable platform. The court said that it is well settled that the master must keep such platforms in good repair, therefore the master was held liable.

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[18]"Since simple tools ordinarily do not cause injury and rarely serious injury, the Simple Tool Doctrine developed upon the illogical idea that there was some inherent magic in the phrase itself." Alexander, *Re-Thinking Negligence* (1939) 11 MISS. L. J. 340, 341.

[19]Wausau Southern Lumber Co. v. Cooley, 130 Miss. 333, 94 So. 228 (1922).

[20]Bear Creek Mill Co. v. Fountain, 130 Miss. 436, 94 So. 230 (1922); Newman Lumber Co. v. Cameron, 179 Miss. 217, 174 So. 571 (1937).

[21]Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117 (1923).

[22]Jones v. United Ice Co., 167 Miss. 886, 150 So. 652 (1933).

[23]Mitchell v. Brooks, 165 Miss. 826, 147 So. 660 (1933).

[24]Middleton v. Faulkner, 180 Miss. 737, 178 So. 583 (1938).

[25]Parker v. Wood Lumber Co., 98 Miss. 750, 54 So. 252 (1910).

[26]Hercules Power Co. v. Tyrone, 155 Miss. 75, 124 So. 74 (1929).

[27]Laurel Mills v. Ward, 134 Miss. 447, 99 So. 11 (1923).

[28]Gulf, M. & N. R. R. v. Graham, 153 Miss. 72, 117 So. 881 (1928).

[29]134 Miss. 447, 99 So. 11 (1923).

[30]Judge Ethridge, with Judge Sykes concurring, wrote a dissenting opinion in this case, pointing out that a ladder is considered one of the most simple appliances in general use and that it was hard to see how a movable ladder could be classed as a place to work.

The court may also avoid application of the simple tool doctrine by means of three exceptions which it has evolved:

(1) Where the tool is defective because of the workmanship or material furnished by the master.[31]

(2) Where the fault is in the type of simple tool furnished rather than in the tool itself.[32] Logically, it seems that any basis, such as knowledge on the part of the employee or public policy, for refusing liability in cases of defective tools would apply here too. Perhaps the decision indicates that the court is now ready to restrict the doctrine and to engraft exceptions whenever possible. The possibilities of this exception are very broad, for using this holding as a basis, it may very easily be said that *any* defective tool is the wrong type of instrument for a master to furnish his servant.

(3) Where the servant is of immature years *and* without experience.[33] Since inexperience is not sufficient within itself to bring this exception into play, it seems that knowledge of the employee is not considered the important factor behind the doctrine in this state.

Thus from a review of the cases it seems that regardless of the seemingly illogical distinctions drawn between various tools, actual knowledge of the employer, promises to repair, assurances of the master, changes of general labor conditions (master's maintaining a workshop and foreman to repair and inspect tools) or statutes—once the court determines that a particular instrumentality is a simple tool or appliance, then the master is practically immune from any liability for injuries caused by defects in the tool.

However, the limitations which have been placed on the doctrine indicate that the court is weighing conflicting interests. In 1910[34] the court probably thought it too much of a burden to require the master to inspect all simple appliances under all circumstances. Later when it was seen that the application of the strict doctrine was bringing about inequitable results in certain cases, the court created exceptions which may be broadened to meet future problems. It will probably be some time yet before the extent of these exceptions and modifications is definitely determined, and the court is able to make a proper adjustment of the various interests involved.

Fletcher F. Veazey, Jr.

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[31]See Bear Creek Mill Co. v. Fountain, 130 Miss. 436, 94 So. 230 (1922), where it was urged that the master had made the defective tool and therefore should be held to a higher degree of care in furnishing a tool which he made himself. The court held that the evidence in this case did not show that the master was negligent in manufacturing the tool or that the tool was made of defective material furnished by the master. This appears to indicate that if the tool is defective because of the material or workmanship furnished by the master, then he will be held liable.

[32]Newman Lumber Co. v. Cameron, 179 Miss. 217, 174 So. 571 (1937).

[33]Middleton v. Faulkner, 180 Miss. 737, 178 So. 583 (1938).

[34]This is the date of Parker v. Wood Lbr. Co., 98 Miss. 750, 54 So. 252, which was the first case in which the Mississippi Court indicated that the simple-tool doctrine is a part of the Master-Servant Law of this state.

Master's Tort Liability to Servant in Mississippi

IV.

The Changing-Place-of-Work Doctrine

In the early development of Master and Servant law there were two traditional rules employed to relieve the master from liability to his servant. The first was that the servant assumed the normal and ordinary risks incident to the business;[1] the second, an outgrowth of the first, was that the master was not responsible for the negligence of a fellow servant.[2] Later, in order to avoid the harshness of these doctrines, it became established that the master was under a nondelegable duty to use reasonable care to furnish the servant a reasonably safe place in which to work.[3] This duty of the master to furnish a safe place of work was forcefully set forth in the leading case of *Finkbine Lumber Co. v. Cunningham.*[4]

In this case the plaintiff was engaged in the manufacture of staves and was working at a circular saw. Through the negligence of a fellow servant, trash and sawdust were allowed to accumulate around the place where the plaintiff was working, and he was injured by slipping on this trash. The court held the master liable, saying that the duty to furnish plaintiff a reasonably safe place of work was not satisfied by once putting the place of work in a safe condition and then allowing it to become dangerous while the servant was at his work. This duty was said to be a *continuing, nondelegable* duty, and that the master must keep the place safe *at all times.*[5]

Six years after the decision in the *Cunningham* case, the case of *Cybur Lumber Co. v. Erkhart*,[6] based upon a cause of action arising in Mississippi, came before the Circuit Court of Appeals. In this case the plaintiff was a member of a crew engaged in operating a "ground skidder" placed in the woods and used for the purpose of pulling logs and placing them in convenient places to be loaded or cut. The skidder could be moved from place to place, and at the time of the injury the plaintiff was helping dismantle it. While so engaged the plaintiff was injured by a falling tree that had been

[1]Natchez Cotton Mill Co. v. McLain, 33 So. 723 (Miss. 1903); Truly v. North Lumber Co., 83 Miss. 430, 36 So. 4 (1904); Yazoo & M. V. R. R. v. Parker, 88 Miss. 193, 40 So. 746 (1906); I. C. R. R. v. Emerson, 88 Miss. 598, 40 So. 818 (1906); 3 Labatt, Master & Servant (1913) c. 50; Alexander, *Re-Thinking Negligence* (1939) 11 Miss. L. J. 290.

[2]New Orleans, J. & G. R. R. v. Hughes, 49 Miss. 258 (1873); Howd v. Miss. Cent. R. R., 50 Miss. 178 (1874); Louisville, N. O. & T. R. R. v. Petty, 67 Miss. 225, 7 So. 351 (1889); Lagrone v. Mobile & Ohio R. R., 67 Miss. 592, 7 So. 432 (1890); 4 Labatt, Master & Servant (1913) § 1393, p. 4007; Note (1939) 12 Miss. L. J. 237.

[3]Note (1939) 12 Miss. L. J. 243, n. 19 and accompanying text.

[4]101 Miss. 292, 57 So. 916 (1911).

[5]*Id.* at 302, 57 So. at 919.

[6]238 Fed. 751 (C. C. A. 5th, 1917).

broken during the progress of the work earlier in the day. The Federal court held that foreman of the crew was a fellow servant of the plaintiff and that the foreman was negligent in not removing the tree. The court recognized the rule that the master was under a nondelegable duty to furnish the servant a reasonably safe place to work, but said that this doctrine applied only to the *creation* of a safe place. The court said that the duty of *maintaining* the safety of the place was a *delegable* duty, and since the place became unsafe because of the negligence of a fellow servant, the plaintiff was barred from recovery by the fellow servant rule. The court then quoted from other cases holding that the master is under no duty to provide a safe place of work where the dangers arise from the changing conditions in the progress of the work. The case was remanded to the Federal District court for a new trial.[7]

When this case was sent back to the District court, the plaintiff took a nonsuit, and brought his suit in the Circuit Court of George County, Mississippi.[8] In the trial in the state court the evidence was established from the record of the previous trial in the Federal court. The jury found for the plaintiff and the defendant appealed.

Appellee contended that the Mississippi court should not relieve the master from liability as did the Circuit Court of Appeals, because that court based its holding on the fact that the master's duty to maintain the safety of the place was a delegable duty. This holding was claimed to be in conflict with *Finkbine Lumber Co. v. Cunningham.* In considering this contention the court recognized the holding in the *Cunningham* case, but said that that case was not controlling because "There is a vital distinction between those cases in which the place itself is constantly shifting or changing and those cases in which the position of the servant is stationary."[9] The court said that the master was not negligent in this case, and quoted from numerous cases from other juridictions to the effect that "The duty to furnish a safe place to work does not apply to temporary perils arising in the course of employment," and that "The rule that an employer must furnish the employee a safe place to work does not apply . . . where the working place is constantly changing, and the employee is assisting in making the changes."[10] The court also quoted from Labatt:[11] "The rule that it is the duty of a master to exercise ordinary care to provide a reasonably safe place of work for his servants is held not to be applicable to cases in which the very work at which the servants are employed is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety. The hazards thus arising as the

[7] *Id.* at 754.
[8] 118 Miss. 401, 79 So. 235 (1918).
[9] *Id.* at 413, 79 So. at 238.
[10] *Id.* at 414, 79 So. at 238.
[11] 3 LABATT, MASTER & SERVANT (1913) § 1177, p. 3140.

work proceeds are regarded as being the ordinary dangers of the employment, and by his acceptance of the employment the servant necessarily assumes them."[12]

From the decision of this case, what has become known as the "changing-place-of-work doctrine" was first introduced into the Master and Servant law of Mississippi. At the time of this decision the doctrine had been generally applied in most jurisdictions, but the Mississippi court had previously decided such cases by merely saying that there was no negligence on the part of the master in such situations.[13] It seems that the doctrine was resorted to in the *Cybur* case as a means of reaching the same desired result as did the Federal court under the same facts, without expressly modifying the broad language used in the *Cunningham* case.[14]

After this doctrine had been introduced in Mississippi it was relied upon in other cases; and the court then had to determine its proper application rather than base its holding on the presence or absence of proof of negligence. In the *Cybur* case, most of the authorities relied on by the court stated the doctrine as applicable to *all* cases where the work in which the servant is employed is constantly producing changes and temporary conditions which render the work more or less dangerous. In considering the *Cunningham* case, however, the court stated that there was a distinction between those cases in which the place itself is constantly shifting or changing and those cases in which the position of the servant is stationary.[15] By this initial application of the rule, the court retained the opportunity of restricting the doctrine to cases where the actual *physical location* of the work itself is changing, rather than including all cases where the *conditions* of the place are changing during the progress of the work, whether the actual place of work is stationary or shifting. If such a restriction is to be made, however, there will be many situations which will present much difficulty of classification.

In the first case decided under the doctrine of the *Cybur* case, the facts presented just such a problem.[16] The defendant was a shipbuilding company, and the plaintiff was a member of a crew

[12]118 Miss. 401, 412, 79 So. 235, 237 (1918).

[13]Robinson Land & Lumber Co. v. Gage, 27 So. 998 (Miss. 1900); New Orleans & N. E. R. R. v. Williams, 96 Miss. 373, 53 So. 619 (1909).

[14]The case of Ragland v. Native Lumber Co., 117 Miss. 602, 78 So. 542 (1918), was decided during the same term of court as was the *Cybur* case and the opinion was written by the same Justice. This case also involved an injury to an employee while hauling logs in the woods. In this case, however, the jury had found that the master was not negligent, and the court merely upheld this finding by saying that there was no proof of negligence and that the case had been submitted to the jury under proper instructions. Neither the *Cunningham* case nor the changing-place-of-work doctrine was mentioned, possibly because the verdict of the jury relieved the court of the necessity of resorting to such a means of saying that the case should not have been submitted to them.

[15]118 Miss. 401, 413, 79 So. 235, 238 (1910).

[16]International Shipbuilding Co. v. Carter, 121 Miss. 103, 83 So. 413 (1919).

of laborers aiding the ship carpenters in the construction of a large wooden sea going vessel. The work of the crew of laborers shifted from one part of the large structure to another as the varying exigencies of construction arose. The natural hazards of the work grew out of the work's progress, and changed and shifted accordingly. The plaintiff was injured when a large piece of timber fell against him. The court held that the defendant was not liable, saying that "the rule which requires the master to furnish a safe place to work does not apply to cases where the prosecution of the work makes the place and creates the danger. The prosecution of the work in the instant case necessarily changed the place of work as the work progressed, and these changes often increased the hazard."[17] The court thereby avoided any requirement that the physical location of the place be changing, but said that it was sufficient if the prosecution of the work makes the place and creates the danger.

In any case where the servant is working on a repair or construction job, it is difficult to determine whether the actual place of work is changing in location or whether the location is constant but the surrounding conditions are changing as a result of the progress of the work. In *Gulf, M. & N. R. R. v. Brown*,[18] the plaintiff was engaged in repairing a wharf and was injured when he stepped on a loose board in the flooring. In *City of Tupelo v. Payne*,[19] the plaintiff was helping in the construction of a small building, and was injured by a falling board. In both of these cases the court said that "where the work is one of construction, reconstruction, destruction, or repair, the risks which are incident to such places and kinds of work are assumed by the servant there employed."[20] By this broad language the court has again avoided any distinction as to what constitutes a changing place of work, but has relieved the master from his duty to make the place safe in practically all cases of repair or construction work.[21]

Although all of the cases considered above involved some form of construction or repair work and did not discuss the exact application of the rule, the more recent cases have recognized certain limitations as to the extent of the situations embraced within it. In *Hamilton Bros. v. Narciese*,[22] the court reiterated the distinction

[17] *Id.* at 113, 83 So. at 414 (1919).

[18] 143 Miss. 890, 108 So. 503 (1926).

[19] 176 Miss. 245, 168 So. 283 (1936).

[20] 143 Miss. 890, 893, 108 So. 503, 504 (1926); 176 Miss. 245, 251, 168 So. 283, 284 (1936); See also 60 A. L. R. 405; 3 LABATT, MASTER & SERVANT (1913) § 924, p. 2466.

[21] In similar cases the master is often exempted from liability by holding that the plaintiff himself was under a duty to make the place safe, with the result that he cannot complain of its unsafe condition, even though the danger did not arise from changing conditions of the work. Cumberland Tel. Co. v. Cosnahan, 105 Miss. 615, 62 So. 824 (1913); Waterman-Fouke Lumber Co. v. Miles, 135 Miss. 146, 99 So. 759 (1924); Hines Lumber Co. v. Dickinson, 155 Miss. 675, 125 So. 93 (1929); Wade-Stevens Lumber Co. v. Addy, 194 So. 303 (Miss. 1940).

[22] 172 Miss. 24, 158 So. 467 (1935).

made in the *Cybur* case. If the plaintiff is working in the same place but the conditions around him are changing, and if it is not the plaintiff's duty to make the place safe under the changing conditions, the doctrine does not apply. In this case it was recognized that men roofing a building may be working in a place of changing or shifting character within the meaning of the rule. The plaintiff, however, was stationed at a derrick attached to the edge of the building and used to haul material from the ground to the roof. He had been working at the derrick for several days and was injured when he stepped in some asphalt which he had spilled some time before. The court said that his place of work was not of a shifting or changing nature, and that the case was controlled by *Finkbine Lumber Co. v. Cunningham.*

In *Gow v. Hunter*[23] the master claimed the protection of the changing-place-of-work doctrine because the servant was injured while moving a heavy machine up an incline. The court held the doctrine inapplicable, saying: "It is true that the position of the machine changed as it moved up the incline, but there was no such change in the place of work, caused by the progress of the work, as would relieve of responsibility."[24] The court held that the change of conditions which created the danger was caused by the direction of the foreman to release the machine before it had come to a satisfactory resting place.

Before the introduction of the changing-place-of-work doctrine in Mississippi, the court had relieved the master from liability under similar circumstances by merely saying that the master was not negligent, that he had done all that a reasonable man could do under the circumstances.[25] By the use of the doctrine, the courts have reached the same result by saying that under such conditions there is no *duty* to furnish a safe place of work. Regardless of the language used by the court, however, the results have been correct, because in every case where the doctrine has been applied the master had acted as a reasonably prudent man under the circumstances. In no case, however, should the application of the rule relieve the master from responsibility if the dangers could have been foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master.[26] If the master could have protected the servant by the introduction of a proper system of doing the work, the court will require him to do so.[27] If he could have prevented the injury by providing a sufficient number of employees,

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[23]175 Miss. 896, 168 So. 264 (1936).

[24]*Id.* at 905, 168 So. at 266.

[25]Robinson Land & Lumber Co. v. Gage, 27 So. 998 (Miss. 1900); New Orleans & N. E. R. R. v. Williams, 96 Miss. 373, 53 So. 619 (1909); Ragland v. Native Lumber Co., 117 Miss. 602, 78 So. 542 (1918).

[26]See *e. g.* Flanagan v. Carlin Const. Co., 134 App. Div. 236, 118 N. Y. Supp. 953 (1909).

[27]Coast Ship Co. v. Yerger, 120 Miss. 152, 81 So. 797 (1919); Note (1939) 12 MISS. L. J. 243, 248.

he is under a duty to do so.[28] Some courts have refused to apply the rule where the servant is acting under the immediate direction of the master's representative,[29] or is working with an assurance by the master that there is no danger,[30] or where the place was dangerous when the servant was set at work.[31] The master has also been held responsible when the necessary and transient dangers of the service, created by the progress of the work, are increased by the negligence of the master without warning.[32]

The master's *duty* to make the place safe is really not eliminated by the fact that the progress of the work necessarily changes the conditions and increases the danger. He still must use reasonable care to make the place reasonably safe under the circumstances. The changing-place-of-work doctrine is merely a convenient manner of saying that the master acted as a reasonably prudent man under such circumstances, and, therefore, should not be held responsible.

Phineas Stevens.

Annulment and Divorce in Mississippi—Deficiencies of the Present Statute and Proposed Statutory Changes

In England the term "divorce" is applied both to decrees of nullity of marriage and decrees of dissolution. But in this country the term is generally limited to decrees dissolving or suspending the effect of a *valid* marriage, although the statutes in some states greatly confuse the terms, allowing "divorce" for causes such as impotency, fraud, duress, *etc.*, which, since they exist before the marriage, are really grounds for a decree of nullity.[1] Divorce has been defined as "the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties;"[2] whereas annulment as it relates to marriage is defined as "the judicial determination of the nullity of a marriage for causes existing at the time of the marriage solemnization."[3] A distinction is generally drawn between a proceeding in equity on the theory that the marriage was void *ab initio*, and the other asking a divorce from its bonds on statutory grounds. From the foregoing, it would appear that divorce, as it is generally understood, is applied to dissolve a marriage wherein the cause for such divorce arose after the celebration of the marriage. Annulment, as distinguished from divorce, is allowed in those cases wherein the cause was in existence at the time of the marriage so as to render

[28]Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792 (1933); *See* Gulf & S. I. R. R. v. Hales, 140 Miss. 829, 835, 105 So. 458, 460 (1935).
[29]Bennett v. Crystal Carbonate Lime Co., 124 S. W. 608 (Mo. 1910).
[30]Owensboro v. Gabbert, 135 Ky. 346, 122 S. W. 178 (1909).
[31]Buchanan v. Murayda, 124 S. W. 973 (Tex. Civ. App. 1910).
[32]Cleveland C. C. & St. L. Ry. v. Foland, 88 N. E. 787 (Ind. App. 1909).
[1]Madden, Domestic Relations (1931) p. 261.
[2]Black, Law Dict. (1891) tit. "divorce".
[3]Ballentine, Law Dict. (1930) tit. "annulment".

the marriage invalid. Divorce adjudicates that a valid marriage is no longer existent due to the intervention of a cause following the marriage; annulment adjudicates that a marriage, thought to be valid, is actually of no validity whatsoever due to the existence of an infirmity or the like at the time the marriage was contracted. Both divorce and annulment have this in common—they are both methods of allowing the parties to escape the bonds of matrimony. The law has taken cognizance of the fact that occasions may arise where it is best that the parties no longer remain in a state of marriage. The attitude of the Mississippi court relative to marriage and annulment has been thus expressed:[4]

> "Marriage was before statutes, and the foundations of good government rest on faithful maintenance of the nuptial contract. So far as human law can render inviolable any contract entered into by human beings, the inviolability of marriage is sought to be inculcated and upheld. But the law, taking knowledge of the sin and wrong and crime that may creep into human life and conduct, and so render the holiest relationship a thing of loathing and horror to outraged innocence and fidelity therein bound, compassionately and wisely makes provision for the annulment of the marriage contract itself on a few specified and well-know grounds. But the voice of the law and the spirit of the law, with all its intendments, make for marriage and for the maintenance of the validity of the marriage contract."

In considering questions which might arise in Mississippi relative to divorce and annulment, one is immediately struck by the confusion arising because of the mingling of divorce and annulment. Divorce has been specifically regulated through statutory provisions, but no mention is made concerning annulment other than to place in the divorce statute causes which were grounds for annulment at common law. The presumption is that those causes which were grounds for annulment at common law and which are not included within the terms of the divorce statute remain open under the common law.[5]

Under the present enactments there are now twelve grounds for divorce in Mississippi.[6] Of these twelve grounds, five were grounds for annulment at common law. Before passage of the present divorce statute, each of these five grounds was recognized as being exclusively within the scope of annulment. As the matter now stands, regardless of the fact that one of the five causes,

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[4]Crawford v. State, 73 Miss. 172, 176, 18 So. 848, 35 L. R. A. 224 (1895).

[5]Malone, *Legislative Needs Concerning Family Relations In Mississippi*, in Proceedings of First Southern Regional Conference and Louisiana State Conference on Family Relations (1939) 27.

[6]MISS. CODE ANN. (1930) § 1414; and Miss. Laws 1932, c. 275; Miss. Laws 1938, c. 264. These various provisions are collected in MISS. CODE ANN. (Supp. 1938) § 587 (C. 1414).

recognized as being a ground for annulment at common law, is existing at the time the marriage is entered, the manner of attacking this is by way of divorce, and there is no remedy by way of annulment. One of the anomalous results of such blending has been pointed out[7] in the instance of a party seeking to avoid the marriage because of incest, where his remedy is by way of divorce.[8] On the other hand, if he seeks to avoid the marriage because of miscegenation, his remedy is by way of annulment.[9] Now, in both these cases, it is recognized that the marriage is null and void because of the natural status of the parties. So the question arises as to why such a distinction is made. Would it not be better to make separate statutes treating both annulment and divorce and specifically setting forth statutory grounds for both and placing both in their natural and more familiar settings? With this in mind and further realizing that some marriages are to be looked upon as void *ab initio* and others merely voidable, it is thought that annulment might best be treated in two statutes—one dealing with those marriages which are absolutely void and the other with those which are voidable.

At common law incurable impotency, existing at the time of the marriage was a ground for annulment;[10] under the statute the remedy is a divorce. At common law capability of consummation is an implied term in every marriage contract. It is so essential that on discovery of the entire incapacity of one of the parties for that duty of wedlock, the other may have a decree annuling the marriage. Although no reported cases have arisen in this state regarding this disability, the result under our present statute would be that even though a party be incapable of fulfilling one of the most important phases of the marital relation, the only remedy is by suit for a divorce to dissolve the bonds of matrimony. To put this ground under an annulment statute would be to replace it in its natural category and render it again a reason why the marriage was actually never legally consummated. In view of the fact that upon discovery the injured spouse may wish to remain married in spite of the disability, this should be grounds for annulment and not a cause whereby the marriage is considered as completely void.

Marriage with an insane person, at common law, was void and could be attacked collaterally. But the common law rule has been changed by statute which now provides that neither insanity nor idiocy of either party at the time of the marriage is sufficient ground for a divorce; but in addition thereto, the other party must have been at the time of the marriage ignorant of such

[7]Malone, *Legislative Needs Concerning Family Relations In Mississippi, supra,* note 5.

[8]MISS. CODE ANN. (1930) § 1414 (11).

[9]MISS. CODE ANN. (1930) § 2361.

[10]Devenbaugh v. Devenbaugh, 5 Paige Ch. 554, 28 Am. Dec. 443 (N. Y. 1839); and see Note: (1836) 28 Am. Dec. 447; 1 BISHOP, MARRIAGE & DIVORCE, (4th ed. 1864) § 323.

disability.[11] It was held in Mississippi[12] that the statute made two modifications of the common law; first, that insanity at the time of the marriage did not make void the marriage contract, and second, that on the dissolution of such a marriage the issue was not bastardized. The result now is that insanity of one of the parties, unknown to the complaining party, does not render the marriage contract invalid, although it must be recognized that there was a disability present at the time the contract was entered into in that one of the parties was wholly incapable of making a legal and binding contract.[13] The sane spouse, ignorant of the disability, should have the right to an annulment in the event the disability continues until the date of suit, in the absence of ratification by the sane spouse following discovery. And this should be true whether the insanity be temporary or incurable.

Having regained sanity, the insane spouse should be permitted to avoid the marriage in the event there has been no subsequent ratification. Failure to recover sanity should be sufficient reason to allow a guardian to intervene for such insane spouse and have the marriage avoided, provided action be brought within a reasonable time. Here the insane party is still incapacitated and not capable of acting for himself.[14] Numerous cases have arisen in Mississippi[15] wherein the heirs of a deceased insane spouse attempted to have the marriage annulled because the living spouse entered the relation for the purpose of obtaining property of the insane party. In line with the intent of the legislature and in order to keep down fraudulent actions, the court has uniformly held that such a proceeding cannot be maintained. The obvious result has been that marriages with a fraudulent purpose have been contracted with an insane person and that purpose carried into effect with no one having the right to contest on the death of the insane party. This may be remedied by providing that the heirs of the insane spouse might avail themselves of this ground in a direct proceeding for annulment after death of the insane spouse provided that death occurred before there was a reasonable opportunity for the appointment of a guardian and that the action is brought within a reasonable time.[16] The situations arising

[11]White v. Williams, 159 Miss. 743, 132 So. 573 (1931).

[12]Smith v. Smith, 47 Miss. 211 (1872).

[13]Ward v. Dulaney, 23 Miss. 410, 414 (1852).

[14]If the insane spouse is still alive, an annulment is granted. Parkinson v. Mills, 172 Miss. 784, 159 So. 651 (1935). Marriage to an insane husband was annulled in an action brought by the husband's guardian against the wife. Here the husband was still alive at the date of suit. The opinion, however, seems to have been affected to a large degree by the apparent fraudulent intent on the part of the wife.

[15]Ward v. Dulaney, 23 Miss. 410 (1852); Powell v. Powell, 27 Miss. 783 (1854); Smith v. Smith, 47 Miss. 211 (1872); Ellis v. Ellis, 152 Miss. 836, 119 So. 304 (1928); White v. Williams, 154 Miss. 897, 124 So. 64 (1929); White v. Williams, 159 Miss. 732, 132 So. 573 (1931).

[16]It is possible that the fraud may be worked by the guardian or heirs in the case of their waiting a long period of time before availing themselves of their rights under this provision. In like manner, should the husband have no immediate heirs, it is suggested that those persons who would have been

under the above discussion should be treated under an annulment statute rather than under the statute declaring marriages absolutely void. In many instances the parties would probably prefer to continue as married, and to require another marriage would be burdensome. In the event insanity intervenes following consummation of the marriage contract, it should be treated under divorce as under the present statute.

It is provided by statute[17] that a marriage license shall not be issued to parties without the consent of the parents, if the man be under 21 or the woman be under 18, but the only result of violation of this provision is a fine to be levied on the officer so issuing the license. Unless we consider that the common law applies as to marriages wherein the male is under 14 and the female is under 12 so as to render them subject to annulment,[18] we find that there is no existing remedy to meet this situation. It has been indicated by the Mississippi court[19] that marriage to a woman under the age of 12 renders the marriage subject to annulment. In order to clear up any questions which might arise, it is recommended that the age be set at 17 for the male and 15 for the female.

As a condition precedent to the issuance of a marriage license, the statute provides[20] that there must be a period of five days between the date of application for a marriage license and the date of issuance of such license. Obviously, the policy underlying this provision was to prevent hasty and runaway marriages, but the effect of the threat of fine on the clerk is of such small consequence that in most cases the requirement is totally disregarded. Even

heirs had the insane spouse died single should be given the right to intervene. To prevent these heirs and others entitled to inherit, exclusive of the other spouse, from working a hardship on the other spouse by delay in instituting proceedings, it is recommended that action must be brought within six months following death. This recommendation is made so as to insure a reasonably fair time in which to settle the rights of all parties and to prevent fraud being perpetrated on the surviving spouse. A possible solution of the problem, without the use of statute, is that the court impose a constructive trust on the surviving spouse so as to prevent his gaining the property of the insane spouse on death of the latter.

[17]Miss. Code Ann. (1930) § 2362.

[18]The age of consent—that is, the age at which an infant could consent to marriage, so that it would be binding—was fixed at common law at 14 for males and 12 for females. Green v. Green, 77 Fla. 101, 80 So. 739 (1919); Browning v. Browning, 89 Kans. 98, 130 Pac. 852, L. R. A. 1916C 737, Ann. Cas. 1914C 723 (1913); Parton v. Hervey, 1 Gray 119 (Mass. 1854); Bennett v. Smith, 21 Barb. 439 (N. Y. 1856).

[19]In Doss v. State, 156 Miss. 522, 126 So. 197 (1929), a defendant on trial for rape set up marriage with the prosecutrix at the time of the offense. The court held that the fact that prosecutrix was under 12 rendered the marriage voidable but denial of the mariage could be made only after a decree of annulment in the chancery court. In Hargrove v. Thompson, 31 Miss. 211 (1856), the contention was that since 18 was set as the necessary age for a woman to be issued a license, marriage under that age was void. The marriage was held valid since parties were above the common law age of consent. See also Hunt v. Hunt, 172 Miss. 732, 161 So. 119 (1935), holding that the mere fact that woman was under 14 and over 13 did not render the marriage voidable.

[20]Miss. Code Ann. (1930) § 2363.

though the court should interpret this provision to be a condition precedent to the fulfillment of a valid ceremonial marriage, since common law marriages are in existence in this state,[21] the result would be that cohabitation following the ceremony would be sufficient to constitute legal marriage with the consequence that the undesirable hasty marriage will not have been materially retarded.[22] Often in the case of a hasty marriage, one of the spouses awakens to the realization that not enough thought was put into the venture and that the marriage was a mistake. But in all events, the only only thing now to be done is to abide by the marriage, since it is either recognized as being a valid ceremonial marriage, or one consummated through the common law. Therefore, it is recommended that failure to observe the delay period should give either party grounds to bring an annulment proceeding provided such action is brought within six months following the marriage. In view of the fact that there may be a tendency to exploit this section for trial marriage purposes, it is recommended that the fine already imposed on the issuing clerk be rigidly enforced.[23] This ground is open to the party upon realization of a mistake made through haste and should not render the marriage null and void but should be ground to have such marriage set aside.

Under the present divorce statute, one type of fraud—pregnancy of the wife by another person at the time of the marriage —if the husband did not know of such pregnancy, is ground for divorce; but this is the only situation covered by the statute where relief is granted for fraud. Under the familiar rule, fraud constitutes ground for having any contract set aside at the election of the defrauded party, and it has not been held that the marriage contract is to be considered as an exception to this rule.[24] Nineteen states expressly state that a marriage induced by force, coercion, or duress is voidable at the suit of the innocent party, while twenty-three juridictions enact that marriages where fraud has been present may be annulled.[25] So it is seen that though fraud and duress are recognized as grounds for setting a marriage aside, they have not been thought to be of that group which render the marriage void *ab initio.* It is generally held that to constitute fraud in a marriage, there must be a deception in respect to some fact whose existence or nonexistence may affect the very essence of the marriage relation.[26]

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[21]Recognized in MISS. CODE ANN. (1930) §§ 2363, 2367; also in Sims v. Sims, 122 Miss. 745, 85 So. 73 (1920).

[22]Malone, *Legislative Needs Concerning Family Relations In Mississippi, supra* note 5.

[23]Malone, *Legislative Needs Concerning Family Relations In Mississippi, supra* note 5.

[24]9 R. C. L. p. 294, § 62.

[25]1 VERNIER, AMERICAN FAMILY LAWS (1935) § 47.

[26]Franke v. Franke, 31 Pac. 571, 18 L. R. A. 375 (Cal. 1892); Gould v. Gould, 78 Conn. 242, 71 Atl. 604, 2 L. R. A. (NS) 531 (1905); Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 12 Ann. Cas. 25, 13 L. R. A. (NS) 996 (1907).

Duress, resulting in loss of free will because of immediate fear of bodily injury has been acknowledged as ground for annulment in this state.[27] Both fraud and duress should be placed in the annulment statute.[28]

Under the broad term "fraud" the American courts have held that concealed pregnancy of the wife by another person, provided the husband did not know of such pregnancy at the time of the marriage, was sufficient to have the marriage annulled.[29] But the question arises as to what the holding would be in the situation where the wife did not know of the pregancy at the time of the of the marriage. It has been held, but more often stated in dicta, that fraud consisting of concealment or misrepresentations as to chastity does not affect an essential of the marriage and is not sufficient ground for annulment.[30] It is distinctly possible that the court, under the general statute on fraud as a ground for annulment would hold that this situation would be covered by such statute. However, in order to insure that relief will be granted in this type situation, it is recommended that a separate section be placed in the statute making a marriage contracted under such conditions voidable.[31]

Intoxication of a party at the time of the marriage avoids it for the same reason that insanity avoids it—because there is no real consent.[32] But we are unable today to say what would be the holding of the Mississippi court since there are no reported cases on this point, and it is not known whether the court would adopt the common law rule as applied to contractual consent. It is recommended that intoxication, when it results in a want of contractual consent, should be made a ground for annulment provided action be brought within six months following the marriage ceremony.

Though one go through a marriage ceremony, yet if one of the parties is mistaken as to the nature of the ceremony, the marriage is at least voidable.[33] Mistake can be included to cover any number of causes, but the suggestion is made that the general ground for using such cause be a failure to understand the nature

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[27]Marsh v. Whittington, 88 Miss. 400, 40 So. 326 (1906); Main v. Main, 113 Miss. 165, 74 So. 138 (1916).

[28]That such grounds are considered only under conditions such as to render the marriage voidable, see: Farley v. Farley, 94 Ala. 501, 10 So. 646 (1892); Tomppert v. Tomppert, 13 Bush. 326, 26 Am. Rep. 197 (Ky. 1877); for a note collecting cases on this point, see, (1899) 79 Am. St. Rep. 371.

[29]Baker v. Baker, 13 Cal. 87 (1859); Reynolds v. Reynolds, 3 Allen 605 (Mass. 1862): Donovan v. Donovan, 9 Allen 140 (Mass. 1897).

[30]Reynolds v. Reynolds, 3 Allen 605 (Mass. 1862); Smith v. Smith, 171 Mass. 404, 59 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (1898).

[31]For a detailed discussion of the subject of fraud in relation to marriage, see Vanneman, *Annulment of Marriage for Fraud* (1925) 9 MINN. L. REV. 497.

[32]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87 (1895); Barber v. People, 203 Ill. 543, 68 N. E. 93 (1903); Montgomery v. U'Nertle, 143 Md. 200, 122 Atl. 357 (1923); Gillett v. Gillett, 78 Mich. 184, 43 N. W. 1101 (1889).

[33]MADDEN, DOMESTIC RELATIONS (1931) p. 10.

of the act, mistake as to identity of the other party, or other similar cause.[34] Here again, provision should be made relative to ratification for it may be that, upon discovery, the parties will desire to continue the marital relation.

Under one Mississippi statute[35] it is provided that the incestuous marriage shall be considered to be void. In another statute,[36] however, it is provided that either party to such marriage may use such grounds for divorce. Thus the incestuous marriage is declared to be no marriage and therefore null and void and is later recognized as being existent, for the action to be removed from the bonds of matrimony has been provided to be by way of a divorce. Since, at common law, an incestuous marriage could be annulled at the suit of either party,[37] and since it has been provided that such a marriage will be considered to be void, it is recommended that this infirmity render the marriage void and that it be removed from the divorce statute. On the notion that here is an infirmity which has been recognized as rendering the parties unable to marry, this marriage should be treated as being void *ab initio*.

In the case of miscegenation, the statute[38] provides that such a marriage is unlawful and void; so it would appear that since this is the only provision relative to such a marriage, the proper manner in which to attack is by way of annulment in the chancery court. It is suggested that this ground be included in the statute declaring the marriage absolutely void.

Under the common law, it is possible to have only one wife or one husband at one time. It necessarily follows that a valid and undissolved prior marriage by either or both of the parties is an impediment to marriage. An attempted second marriage while a valid prior marriage is undissolved is absolutely void, and void *ab initio*, without any decree of court.[39] But the present divorce statute[40] provides that marriage to some other person at the time of the pretended marriage[41] between the parties shall be ground for divorce. Thus at present, the bigamous marriage in Mississippi gives the injured spouse only the right to receive a divorce. With the rule and reason of the common law, it is re-

[34]Marriage in jest should be included within the terms of this section; for if the words of consent are spoken in a spirit of jest, with no serious intention to become man and wife, there is no marriage even though the person who officiated at the ceremony believed that the parties were serious. McClurg v. Terry, 21 N. J. Eq. 225 (1870); Meredith v. Shakespeare, 96 W. Va. 229, 122 S. E. 520 (1924); Couch v. Wartenberg, 86 W. Va. 664, 104 S. E. 117, 11 A. L. R. 212 (1920).

[35]Miss. Code Ann. (1930) § 2360.

[36]Miss. Code Ann. (1930) § 1414 (11).

[37]Amis, Divorce & Separation In Mississippi (1935) p. 97.

[38]Miss. Code Ann. (1930) § 2361.

[39]Madden, Domestic Relations (1931) p. 39.

[40]Miss. Code Ann. (1930) § 1414 (9).

[41]It should be noted that the legislature, to some degree, recognized that the second marriage was not valid in that the wording of the statute includes *pretended* marriage in reference to the second agreement.

commended that the marriage not be recognized as ever having existed and that the bigamous marriage be considered to be void *ab initio*.

The effect of declaring a marriage void at common law was to render all issue from such marriage illegitimate, but that result was modified somewhat by the divorce statute of Mississippi transferring most of the grounds for rendering a marriage void to a proceeding wherein such marriages were rendered voidable.[42] However, in view of the fact that we have suggested once again putting certain of these grounds back in a statute wherein they are to be considered as absolutely void, it is to be supposed that issue from these marriages will again be looked upon as being illegitimate. It goes against the grain of moral justice when one considers that these children, through no fault of their own, are branded for the rest of their lives with the mark of illegitimacy and are placed in a position of being looked down upon socially. The Mississippi court has indicated its unwillingness to bastardize issue from a marriage which has been annulled even though the marriage was induced through the fraud of one of the parties.[43] In line with the above discussion, it is recommended that a further enactment be placed in our statutes whereby issue from any marriage, even though it be void or voidable, be considered legitimate.[44]

From the circumstances of each case, a situation will probably arise wherein it will be difficult to dispose of the children through conflicting claims by both spouses. In order to protect the children of such marriages and to insure their well-being and proper management, it is recommended that provision be made that the court be given a wide discretion to properly provide for the care and custody of all children born from either a void or voidable marriage.

In reference to alimony,[45] it is recommended that provision be made relative to caring for the wife in those cases wherein the marriage is recognized as being merely voidable and where the wife is not the one at fault. For several years, the parties may have been living with full thought of being legally married when it develops that the marriage, through some defect of earlier years, actually is subject to annulment and is thus voidable. At this time, the wife may have given the best of her years to the husband and now be unable either to find work or to attract other suitors. In such situations, the court, in its discretion, may allow alimony in order that the wife of such viodable marriage be provided for. The chief reasons for the rigid policy of our court in refusing to

[42]White v. Williams, 159 Miss. 732, 132 So. 573 (1931); Parkinson v. Mills, 172 Miss. 784, 159 So. 651 (1935).

[43]Ervin v. Bass, 172 Miss. 332, 160 So. 568 (1935).

[44]This is intended to cover issue coming from such marriage and should not include the issue from that marriage wherein there is concealed pregnancy of the wife by another person, since this child has no right to carry the name of the injured husband nor to be considered as such husband's heir.

[45]MISS. CODE ANN. (1930) § 1421.

grant an annulment in the case of fraud and duress were reluctance to bastardize issue and to free the husband from any obligations to support the wife. These objections would be removed under the suggested changes, and the court might very properly adopt a broader meaning for the terms "fraud" and "duress".[46]

In accordance with the views set out in this article, the following statutes are recommended:

MARRIAGE—NULL AND VOID—WHEN. All bigamous, incestuous or miscegenatious marriages are void without the necessity of a decree, but a declaration of nullity may be obtained at the suit of either party.

ANNULMENT OF MARRIAGES. In the absence of ratification,[47] a marriage may be annulled for any one of the following causes existing at the time of the marriage ceremony:

(a) Incurable impotency.

(b) Insanity of either or both parties. Action in behalf of an insane spouse may be brought by guardian, or in case the spouse has died before there is a reasonable time for appointment of a guardian and bringing of suit, by any relative who would have inherited had the spouse been single provided suit be brought within six months after the death.

(c) Non-age (less than 17 years for the male and less than 15 years for the female)[48] of the party bringing suit. Suit must be brought under this section within one year after the party availing himself of this section becomes of age.

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[46]The attitude of the court is to require strict proof of duress in that the husband must have been placed in immediate fear of bodily injury. In Zeigler v. Zeigler, 174 Miss. 302, 164 So. 768 (1935), the husband was placed in jail and told that he was to be prosecuted under a statute whereby it was a felony to have carnal knowledge of a female under 18 years of age. Actually the woman was over 18. As a result of the threats of prosecution, husband went through the marriage ceremony. This was held not to be duress. In Rogers v. Rogers, 151 Miss. 644, 118 So. 619 (1938) the husband, threatened with prosecution for rape and possible hanging, went through the marriage ceremony. This, too, was held not to be duress. The wife would be provided for and issue, if any, declared legitimate, as a result of the proposed statute, thereby removing the objections to annuling such marriages.

[47]What will constitute ratification will vary with the different causes listed in the statute, and no attempt has been made to define the term. It has been assumed, however, that this phrase will eliminate any need for provision that the injured party not know of the cause for annulment at the time of the marriage.

[48]It is difficult to decide what age should be specified at which parties may be considered as competent to marry. If the common-law rule (see n. 18 *supra*) be adopted, the parties will be comparatively young for such venture; whereas if the age be considered that as applying under MISS. CODE ANN. (1930) § 2362, the age would be comparatively high. In order that there be certainty as to what the age requirements shall be, 17 is suggested for the male and 15 for the female.

(d) Failure to comply with the five-day period of delay as required by Section 2363, Code of 1930. Suit for this cause may be brought at any time within six months after the marriage, but not thereafter.

(e) Fraud or duress imposed upon the party bringing suit.

(f) Pregnancy of the wife by another person.

(g) Lack of contractual consent due to mistake, drunkenness or other similar cause.

CAUSES FOR DIVORCE. Divorce from the bonds of matrimony may be decreed to the injured party for any of the following causes:

(a) Adultery.[49]

(b) Being sentenced to any penitentiary and not pardoned before being sent there.

(c) Wilful, continued and obstinate desertion for the space of one year.

(d) Habitual drunkenness.

(e) Habitual and excessive use of opium, morphine, or other like drug.

(f) Habitual cruel and inhuman treatment.

(g) Incurable insanity. But no divorce shall be granted upon this ground unless the insane party shall have been under regular treatment for insanity and causes thereof preceding the commencement of the action. No divorce shall be granted because of insanity until a thorough examination of such insane person by three physicians who are recognized authorities on mental diseases, one of which physicians shall be a superintendent of a state hospital for the insane, and the other two physicians to be appointed by the court before whom the action is pending, all of whom shall agree that such insane person is incurable; provided further, that in granting a divorce on this ground, notice of the pendency of the action shall be served in such manner as the court may direct, upon the nearest blood relative and guardian of such insane person, and the superintendent of the institution in which he is confined. Such relative or guardian and superintendent of the institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the insane person shall not be altered in any way by the granting of the divorce.

[49]As the divorce statute stands, stripped of those grounds which have been placed under annulment and void marriages, it may appear that there is no remedy accorded the injured spouse to the first marriage in the instance of a bigamous marriage. But second thought will indicate that a divorce might be obtained on the ground of adultery.

However, a decree of divorce on the ground of incurable insanity, shall not abridge or effect the right of the insane person to inherit, and before any such decree is granted, the complainant shall enter into bond to be approved by the court, in such an amount as the court may think just and proper, conditioned for the care and keeping of such insane person during the remainder of his or her natural life, unless such insane person has a sufficient estate in his or her own right for such purpose.

LEGITIMATION OF ISSUE. The issue of a void marriage, or a marriage which has been annulled or dissolved by a decree of divorce is legitimate, whether the marriage be declared void because of a prior existing marriage or not.[50]

ANNULMENT—CUSTODY OF CHILDREN. When an annulment shall be decreed or a marriage declared void, the chancery court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody, and maintenance of the children of the marriage; and the court may, afterwards, on petition, change the decree and make from time to time such new decree as the case may require.

ANNULMENT—ALIMONY. When an annulment shall be decreed, the court may, in its discretion having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the maintenance and alimony of the wife, or any allowance to be made to her, and may, if need be, require sureties for the payment of the sum so allowed; and the court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require.[51]

Dan H. Shell.

JURISDICTION EXERCISED BY THE CIVIL COURTS OVER ECCLESIASTICAL MATTERS

The history of the often conflicting jurisdictions of the civil courts and the ecclesiastical tribunals in England dates back to the invasion of William of Normandy in 1066.[1] But that history is relatively unimportant to us since the effect of the English system on the American people has been only indirect and the tendency has been always away from it. The culmination of this tendency was in the almost complete separation of the church and the state. It was due to this separation that the civil courts de-

[50]Pre-existing marriages are included within this provision to repeal that part of § 1422, MISS. CODE ANN. (1930), declaring issue from such marriage to be illegitimate.

[51]This section is recommended separately from that statute providing for care and custody of the children for the reason that it is not recommended that the wife be given alimony under a marriage which is not recognized as ever having existed—a void marriage.

[1]For a good outline of the history of this subject see Note, *The Regression of Ecclesiastical Jurisdiction* (1923) 32 YALE L. J. 594.

termined that they would not try a purely ecclesiastical question, and each time such an issue arises the court simply repeats the rule that the civil courts have no jurisdiction over ecclesiastical questions.[2] Actually they do have authority over all persons, organizations, and property within their geographical bounds. What the courts mean when they say that they have no jurisdiction is not that they have not the power to try the case, but that they do not choose to try the case. The truth is that, for matters of policy, the courts do not want jurisdiction, as was emphatically admitted in the case of *Dees v. Moss Point Baptist Church*.[3] They realize their own inability intelligently to consider the doctrinal and religious tenets of the various denominations and creeds. On the other hand they recognize the superiority in such matters of those who have made a lifelong study of the particular creed in question. For this reason they adopt as conclusive the ruling of those persons in each church on "purely ecclesiastical" questions. For the civil courts to review them, as stated in *Watson v. Jones*,[4] would be to "appeal from the more learned tribunal in the law which should decide the case, to one which is less so."

Furthermore, if the courts overrule a decision of an ecclesiastical tribunal, the ill effects of the decision resulting from the resentment at the interference will outweigh the questionable justice done in the individual case, and, if widespread in its effect, may tend towards insurrection.

Purely ecclesiastical questions, then, are left to the proper tribunal in each particular denomination, and its decision on the matter is usually held *res adjudicata* and binding upon civil courts. The types of church organizations, and thus the personnel and procedure of the high tribunals, are divided into two groups: (1) Independent churches which have no organic connections with, and owe no fealty to, any association of churches; and (2) churches which are only subordinate members of some general church in which there are superior ecclesiastical tribunals.

In the first of these groups, the civil courts recognize as final the decision of a majority of the congregation itself, or such of its members as the congregation may designate as its tribunal for the decision of such matters. In the latter group, the only decisions which are binding on the civil courts are those rendered by the highest tribunal of the general organization.

When these decisions are accepted, however, it is generally pre-supposed that they were regularly arrived at through some formal action, along the lines of procedure set up by the body it-

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[2]This is the statement in Grantham v. Humphries, 188 So. 313 (Miss. 1939), the most recent case upon the subject.

[3]17 So. 1 (Miss. 1895).

[4]13 Wall. 679, 729 (U. S. 1871). This is the leading case on the jurisdiction of civil courts over ecclesiastical questions.

self, the courts not attempting to lay down rules for its operation.[5] Decisions have been reversed because not regularly arrived at.[6]

The foregoing considerations would seem to indicate that the problem is a very simple one which could never cause much difficulty in its application. That would be true if there could be an absolute and complete separation of the church and the state, but it is complicated by the fact that spiritual rights and privileges are inextricably interwoven with civil rights, which the civil courts feel that they are bond to protect.

Thus we find the courts taking jurisdiction of church questions to the extent necessary to protect civil rights, the chief one of these being the ownership of property. In conflict with the general rule that the civil courts will take no jurisdiction over a purely ecclesiastical question, the rule has been universally followed that the civil courts will protect the property rights of the church and will inquire into ecclesiastical or doctrinal questions so far as may be necessary to determine the property rights.[7]

What is a property right? The best answer to this question lies in a consideration of the cases to see what actions the courts will entertain as involving property rights. The equity court will hear a bill to secure an adjudication as to the rights of contending parties to the use of church property;[8] or to secure the enforcement

[5]Watson v. Jones, 13 Wall. 679, (U. S. 1871).

[6]Barton v. Fitzpatrick, 187 Ala. 273, 65 So. 390 (1914); Stogner v. Laird, 145 S. W. 645 (Tex. Civ. App. 1912).

[7]Mendelsohn v. Gordon, 156 S. W. 1149 (Tex. Civ. App. 1913). See also cases cited in notes 8-18 *infra*.

[8]Manning v. Yeager, 201 Ala. 599, 79 So. 19 (1918); Morris v. Griffin, 146 Ark. 439, 225 S. W. 634 (1920); Shackleford v. Rutledge, 160 Ga. 688, 128 S. E. 794 (1925); German Evangelical Lutheran Trinity Cong. v. Deutsche, Etc., Gemeinde, 246 Ill. 328, 92 N. E. 868 (1910); Brown v. Scott, 138 Md. 237, 113 Atl. 727 (1921); Komarynsky v. Popovich, 218 Mich. 481, 188 N. W. 386 (1922); Woodrum v. Burton, 88 W. Va. 322, 107 S. E. 102 (1921); Lutheran Trefoldighed Cong. v. St. Paul's English Evangelical Lutheran Cong., 159 Wis. 56, 150 N. W. 190 (1914).

In a recent Mississippi case, Grantham v. Humphries, 188 So. 313 (Miss. 1939), the court refused to take jurisdiction, even though there were two factions claiming the church property. The case as reported fails to state whether the property was the subject of an express trust, or whether it was acquired under such circumstances that a trust should be implied. A distinction is drawn in the opinion between this case and Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714 (1901). The difference between the two, as affected by the principles discussed in this note, is that in the *Mt. Helm* case the majority faction openly proclaimed that they had departed from the Baptist doctrines. The court there took jurisdiction and returned the property to the faithful minority. In this case the minister "went fundamentalist" but still claimed to be preaching the Baptist doctrines, and there was not a "clear case of departure." There was a property right involved. It is significant that it was the minority group that deviated from the customary beliefs of that church, and it was the majority who retained the former beliefs and were still in control of the property. If there was a departure, it was by the minority who had already been excluded and thus, the result would have been the same had the court taken jurisdiction. (See *infra*, n. 30, and corresponding text). But the decision that the court would not take jurisdiction under this set of facts does not seem to be in line with the general view.

of a trust for religious purposes and to prevent a departure from the designated faith or doctrine in contravention thereof;[9] or to secure the specific performance of a contract of sale of land to the society,[10] or a reconveyance of church property to trustees of an unincorporated society by a corporation secretly and fraudulently organized to take over the property;[11] or to restrain a threatened interference with worship or church management in accordance with the designated faith and doctrine,[12] unless the property is held free of any trust, express or implied;[13] or to make a division of property between the opposing factions in case of a schism;[14] or, under statutory authority, to declare a church extinct and to decree the disposition of its property.[15] Courts of law will try an action for the recovery of the possession of property;[16] or an action of ejectment by which to determine the right to possession of church property as between parties claiming to be trustees of the church,[17] or persons claiming under them.[18].

Distinguished from property rights are the "purely ecclesiastical" questions, a few examples of which are: Whether a proposed revised confession of faith and amended constitution has become the fundamental belief and constitution of the society;[19] whether the church has the power to enter into a union with another religious society;[20] whether a religious society was justified in expelling one of its members where no question arises as to the invasion of a property right of the person expelled;[21] whether cer-

[9]Mitchell v. Mt. Olive Church of Christ, 221 Ala. 315, 128 So. 781 (1930); Tebo v. Hazel, 74 Atl. 841 (Del. 1909); Lamb v. Cain, 129 Ind. 486, 29 N. E. 13 (1891); Immaculate Conception Parish v. Murphy, 89 Neb. 524, 131 N. W. 946 (1911); Hartford First Baptist Church v. Witherell, 3 Paige 296, 24 Am. Dec. 223 (N. Y. 1832); Kicinko v. Petruska, 259 Pa. 1, 102 Atl. 286 (1917).

[10]Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 51 So. 947 (1909).

[11]Bomar v. Mt. Olive Missionary Baptist Church, 92 Cal. App. 618, 268 Pac. 665 (1928).

[12]Church of Christ v. Harper, 83 Cal. 41, 256 Pac. 476 (1927); McCluskey v. Rakestraw, 167 Ga. 199, 144 S. E. 761 (1928); Komarynski v. Popovich, 232 Mich. 88, 205 N. W. 184 (1925); Kedrovsky v. Rojdesvensky, 242 N. Y. 547, 152 N. E. 421 (1926); Maceirinas v. Chesna, 299 Pa. 70, 149 Atl. 94 (1930); Middleton v. Ellison, 95 S. C. 158, 78 S. E. 739 (1913); Eternal Truth Spiritualist Church v. Stuber, 105 Wash. 154, 177 Pac. 686 (1919).

[13]Illinois Classis of Reformed Church v. Holben, 286 Ill. 473, 122 N. E. 46 (1919).

[14]Lost River Evangelical Lutheran Cong. v. Thoen, 149 Minn. 379, 183 N. W. 954 (1921).

[15]General Six Principle Baptist Conference v. Bennett, 83 Atl. 758 (R. I. 1912).

[16]Smith v. Pedigo, 145 Ind. 361, 33 N. E. 777 (1893), 44 N. E. 363 (1896).

[17]Yanthis v. Kemp, 43 Ind. App. 203, 85 N. E. 976 (1908), 86 N. E. 451 (1908).

[18]Humphreys v. Hunter, 20 U. C. C. P. 456 (Ont.).

[19]Lamb v. Cain, 129 Ind. 486, 29 N. E. 13 (1891).

[20]Brown v. Clark, 102 Tex. 323, 116 S. W. 360 (1909).

[21]Dees v. Moss Point Baptist Church, 17 So. 1 (Miss. 1895); Bouldin v. Alexander, 15 Wall. 131 (U. S. 1872); State v. Cummins, 171 Ind. 112, 85 N. E. 359 (1908); Carter v. Papineau, 222 Mass. 464, 111 N. E. 358 (1916); Hardin v. Detroit Second Baptist Church, 51 Mich. 137, 16 N. W. 311 (1883); Landis

tain members have seceded and thus, although a majority, lose their rights to the church property;[22] and whether the church should dismiss an officer, where there is no right of property involved except a clerical office or salary.[23]

The courts, then agree that there must be a property right involved before they will take jurisdiction. But assuming that this obstacle has been passed and that the court will undertake to render a decision on the case, what rules will guide the court in reaching that decision? It is possible to draw certain distinctions which may be of value and to indicate certain factors which may influence the decision.

When it is at all possible, in cases where the determination of the right to church property is dependent upon a construction of the creed, the courts will take as final the construction of the proper ecclesiastical tribunal and will determine the property rights upon the basis of that ruling. The only times when a civil court will even inquire into the jurisdiction of a religious tribunal are where the body acted obviously in excess of its jurisdiction or powers, or in clear violation of the fundamental laws of the order;[24] or where its action, though otherwise regular and within its powers, involves a clear departure from the characteristic doctrines of the society, and, if given effect as to property rights, would amount to a diversion of the property from a trust to which it is subject.[25] But, it must be remembered that here, as in all other cases, some property or other civil right must be involved before the civil courts will take a hand in the controversy. And even in cases involving property the decision of the church tribunal is final unless there is some contention that there has been a departure from the faith, and consequently a perversion of the property from the purpose to which it was dedicated.[26]

Most churches are unincorporated, and therefore cannot own property in their own name. For this reason a majority of church property is actually the subject of a trust in which the proper authorities are the trustees and the advocates of the particular creed

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v. Campbell, 79 Mo. 433, 49 Am. Rep. 239 (1883); Morris St. Baptist Church v. Dart, 67 S. C. 338, 45 S. E. 753 (1903); Nance v. Busby, 91 Tenn. 303, 18 S. W. 874 (1892).

[22]Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449 (1882).

[23]Chase v. Cheney, 58 Ill. 509, 11 Am. Rep. 95 (1871).

[24]Mason v. Lee, 96 Miss. 186, 50 So. 625 (1909); Hatfield v. De Long, 156 Ind. 207, 59 N. E. 483 (1901); Kerr's Appeal, 89 Pa. 97 (1879); Bouldin v. Alexander, 15 Wall. 131 (U. S. 1872); Watson v. Avery, 2 Bush. 332 (Ky. 1867).

[25]Kamarynsky v. Popovich, 218 Mich. 481, 188 N. W. 386 (1922); Everett v. Trustees of First, etc., Church of Asbury Park, 53 N. J. Eq. 500, 32 Atl. 747 (1895); Linstrom v. Tell, 131 Minn. 203, 154 N. W. 969 (1915); Cope v. Plymouth, *etc.*, Church, 130 Wis. 174, 109 N. W. 928 (1906); Finley v. Brent, 87 Va. 103, 12 S. E. 228 (1890); Schnorr's Appeal, 67 Pa. 138 (1870).

[26]German Evangelical Lutheran Trinity Cong. v. Deutsche, *etc.*, Gemeinde, 246 Ill. 328, 92 N. E. 868 (1910).

are the *cestuis que trust.* These trusts may be express or implied, and their purposes may fall into either of the three groups as outlined in *Watson v. Jones*:[27]

> "1. The first of these is when the property which is the subject of the controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.
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> 2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.
>
> 3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."

As indicated by the excerpt, the first class applies exclusively to express trusts. The intricacies of specific doctrines are indefinite enough at best, and the terms of a trust under these circumstances must be expressly set out if they are to be given effect. The *Watson* case,[28] continues to say of the first class, "In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine."[29] This is the universally adopted rule for that class of cases.

This is one class of cases where it will often be necessary for the civil courts to inquire into the doctrines and religious tenets of the church to determine which faction is abiding by the terms of the trust, and thus they are obliged to take jurisdiction of, and decide "purely ecclesiastical" questions in the interest of the protection of

[27]13 Wall. 679, 722 (U. S. 1871).
[28]13 Wall. 679, 723 (U. S. 1871).
[29]See also Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 502, 30 So. 714 (1901), where the court said, "We think it is clear that the original donor donated it for use as a Baptist Church, and more specifically, for the Mt. Helm Baptist Church and that may not be changed by a majority of the members claiming not to be Baptists."

property rights.[30] With this type of organization the majority prevails, and the court will recognize that majority rule if there has been no departure from the doctrines or creeds protected by the trust.[31] This rule has been ignored in favor of strict majority control in *Turpin v. Bagby*.[32]

An express trust may be made of property deeded or devised to churches of the second group. In such case the terms of the trust provide merely that the property is held in trust for the named congregation and includes no designation of any particular creed which is to be taught. A majority of that congregation, then, is entitled to decide the use to be made of the property, and the courts will go no further than to inquire into the regularity of the procedure in arriving at the decision.[33]

Many of the churches falling under the second group are voluntary members of some larger association of churches, but there is no organic connection. A general council of such association often decides questions arising in local churches, either voluntarily or upon submission of the issue to them by the factions of the church. Those opinions, according to the general view, are not conclusive or binding upon the civil courts in the determination of property rights, but are merely advisory.[34] The Mississippi Court apparently adopted this rule in *Windham v. Ulmer*,[35] where it said, "While what are known as Baptist Associations, both district and state, exist, they possess neither appellate jurisdiction nor revisory power, but may advise the churches, without in any way binding the latter to accept such advice."

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[30]Nance v. Busby, 91 Tenn. 303, 18 S. W. 874 (1892); Sarver's Appeal, 81 Pa. 183 (1874); Rodgers v. Burnett, 108 Tenn. 173, 65 S. W. 408 (1901).

[31]Bennett v. Morgan, 112 Ky. 512, 16 S. W. 287 (1902); Nance v. Busby, 91 Tenn. 303, 18 S. W. 874 (1892); Shannon v. Frost, 3 B. Mon. 253 (Ky. 1842).

[32]138 Mo. 7, 39 S. W. 455 (1897).

[33]Smith v. Charles, 24 So. 968 (Miss. 1899); Mason v. Lee, 96 Miss. 186, 50 So. 625 (1909); Allen v. Roby, 109 Miss. 107, 67 So. 899 (1915). See also Dees v. Moss Point Baptist Church, 17 So. 1, 2 (Miss. 1895), where the court said, "The Baptist Church at Moss Point was and is in government and discipline a pure democracy. Its determination of questions of doctrine and discipline is exclusive and final. There is no appeal to any superior ecclesiastical court, and over things spiritual or ecclesiastical the civil courts, ordinarily, may not take jurisdiction."

[34]Bouldin v. Alexander, 15 Wall. 131 (U. S. 1872); Monk v. Little, 122 Ark. 7, 182 S. W. 511 (1916); Smith v. Pedigo, 145 Ind. 361, 33 N. E. 777 (1893), 44 N. E. 363 (1896); Ingleheart v. Rowe, 20 Ky. L. Rep. 821, 47 S. W. 575 (1898); Pulis v. Iserman, 71 N. J. L. 408, 58 Atl. 554 (1904); Gudmundson v. Thingvalla, Lutheran Church, 29 N. D. 291, 150 N. W. 750 (1915); Jarrell v. Sproles, 20 Tex. 387, 49 S. W. 904 (1899).

[35]102 Miss. 491, 495, 59 So. 810 (1912).

The general rule as to the application of an express trust to churches of the third class is outlined in *Carothers v. Moseley*.[36] The property in question there is held under a deed which simply conveyed it for the use of the Cumberland Presbyterian Church of West Point, Mississippi. Upon the union of the Cumberland Presbyterian Church and the Presbyterian Church, U.S.A., the congregation of the West Point church divided, each claiming the property under the terms of the deed. The question for the court then was the validity of the union, thus determining which faction was the true successor of the "Cumberland Presbyterian Church of West Point, Mississippi." The court said,[37] "The validity of this union is purely an ecclesiastical question, involving the doctrine, discipline, ecclesiastical law, rule, and custom of the Cumberland Presbyterian Church. Such questions this court will not for itself determine, even where property rights are involved, but will accept the decision thereof by the highest ecclesiastical authority of the church[38]. . . Under the Presbyterian system of ecclesiastical government, the highest authority charged with the determination of the matter here in controversy is the General Assembly. Its decision as to the validity of this union, therefore, will be accepted by this court, and the property in controversy given to the faction adhering thereto."[39]

Often where the property was not conveyed to the church under the terms of an express trust, it was conveyed under such circumstances that the court will imply a trust. Thus, in churches of the second group, even where the conveyance does not expressly mention any doctrine or creed to be taught, the courts will many times look into the wording of the conveyance, along with the surrounding circumstances, to see whether the settlor actually intended that it should be used for the promotion of certain general creeds. Where such intention is found, it will be given effect, and a majority of the members will not be allowed to change it, or take the property from a faithful minority.[40] The leading case upon the subject of implied trusts in conveyances to independent churches

[36]99 Miss. 671, 55 So. 881 (1911).

[37]99 Miss. 671, 676, 55 So. 881 (1911).

[38]Here the court cites Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714 (1901) and Smith v. Charles, 24 So. 968 (Miss. 1899).

[39]The court cites the following cases from other jurisdictions which hold the same way on this particular union: Mack v. Kime, 129 Ga. 1, 58 S. E. 184 (1907); Brown v. Clark, 102 Tex. 323, 116 S. W. 360 (1909); Ramsey v. Hicks, 174 Ind. 428, 91 N. E. 344 (1910); Presbyterian, Etc., v. Cumberland, Etc., 245 Ill. 74, 91 N. E. 761 (1910); Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684 (1909); Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 106 Pac. 395 (1909); Sanders v. Baggerly, 96 Ark. 117, 131 S. W. 49 (1910); Harris v. Cosby, 173 Ala. 81, 55 So. 231 (1911). Watson v. Jones, 13 Wall. 679 (U. S. 1871) upholds this view and gives a good discussion of the underlying principles of the problem.

[40]The leading Mississippi case which involves these principles is Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714 (1901). There the settlor conveyed part of the property to trustees of the Mt. Helm Baptist Church and their successors in office. Later the rest of the property was bought by contibutions of members. The court says, "It is enough for us that the Baptist

is *Free Church of Scotland v. Overtoun*,[41] in which the House of Lords in General Assembly held that the Free Church had no power, where property was concerned, to alter or vary the doctrine of the church; and the minority adhering to the original doctrines and tenets were entitled to the property.

Generally, then, it may be said that, in the absence of express terms to the contrary, the courts will imply a trust of the property to the continued promotion of the doctrines adhered to at the time of its acquisition.[42] In case of a schism in the church, it becomes necessary to construe the creed of each faction in relation to the creed protected by the trust to determine which is the true *cestui que trust*. And here again the courts find it necessary to decide "purely ecclesiastical" questions.

In the same way, where property is conveyed to a member of the third group, the courts will ordinarily imply a trust of the property for the promotion of the characteristic doctrines of that general association of which the beneficiary church is a member at the time of its acquisition of the property.[43] In case of a division in the church here, the civil courts will accept as conclusive the decision of the highest church tribunal on the question of the relative faithfulness of the two factions to the creeds of that denomination, and are seldom obliged to review such decisions.[44]

Marvin Williams.

Church as it exists today is one of the well known religious denominations of the world, and that the appellees have, in the manner indicated, most emphatically and unmistakably repudiated it, and set up and organized a wholly new and distinct church of their own. We think it is clear that the original donor of the property constituting the Mt. Helm Baptist Church edifice and grounds donated it for use as a Baptist Church, and more specifically the particular Baptist Church known as the 'Mt. Helm Baptist Church', and that its dedication to that use cannot be altered by those openly proclaiming that they are not Baptists, although they may constitute a majority in number of the old church. . . . The property is held in trust by the church for the purpose for which it was dedicated by the donor, and for that purpose alone." Id. at 501, 30 So. at 716.

[41][1904] A. C. 515.

[42]Baptist City Mission Soc. v. Peoples Tabernacle Cong. Church, 64 Colo. 574, 174 Pac. 1118 (1918); Everett v. Jennings, 137 Ga. 253, 73 S. E. 375 (1911); Stallings v. Finney, 287 Ill. 145, 122 N. E. 369 (1919); Smith v. Pedigo, 145 Ind. 361, 33 N. E. 777 (1893), 44 N. E. 363 (1896); *In Re* Stuart, 184 Iowa 165, 168 N. W. 779 (1918); Immanuel's Gemeinde v. Keil, 61 Kan. 65, 58 Pac. 973 (1899); Bennett v. Morgan, 112 Ky. 512, 66 S. W. 287 (1902); Lindstrom v. Tell, 131 Minn. 203, 154 N. W. 969 (1915); Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714 (1901); Hale v. Everett, 53 N. H. 9 (1868); Kniskern v. St. John's & St. Peter's Lutheran Churches, 1 Sandf. Ch. 439 (N. Y. 1844); Bendewald v. Ley, 39 N. D. 272, 168 N. W. 693 (1918); Suter v. Spangler, 4 Phila. 331 (Pa. 1861); Peace v. First Christian Church, 20 Tex. 85, 48 S. W. 534 (1898).

[43]Carothers v. Moseley, 99 Miss. 671, 55 So. 881 (1911).

[44]See Carothers v. Moseley, 99 Miss. 671, 678, 55 So. 881, 882 (1911), where the court said, "It may be that cases may arise wherein the decision of the ecclesiastical tribunal is so palpably erroneous, or so manifestly in excess of its jurisdiction, that the civil courts ought to decline to be bound thereby." The opinion stated, however, that they were not deciding that point.

The Judicial Definition of "Self-Incrimination"

It was not until late in the seventeenth century that compulsion as a means of extracting self-incriminatory responses was seriously questioned and the eighteenth century saw the beginning of the formation of the privilege.[1] This exemption from testimonial compulsion arose, in American law, shortly before the formation of the Union. It became entrenched in the common law and, before the adoption of the Federal Constitution, five states[2] had included in their constitutions a provision that no man should be compelled to give evidence against himself in criminal cases. At the present time a similar provision is incorporated into the constitutions of all the states of the Union except Iowa and New Jersey, being provided for in those states by statute,[3] while the Fifth Amendment of the Federal Constitution likewise bestows the right of silence.

Much of the confusion on the subject of the privilege and what it is to serve arose from erroneous dicta in the case of *Boyd v. United States*.[4] Both the history of the privilege—it having arisen to rectify the evils resulting from the "inquisitorial method of putting the accused upon his oath"—and its policy—"to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions" show that it is only testimonial compulsion that falls within the privilege.[5] Wigmore concludes that: "The privilege protects a person from any disclosure sought by legal process against him as a witness."[6]

The case of *State v. Billups*[7] brings up the rule in one of its narrower aspects, that is, whether the compulsory exhibition of the private business records involved was in violation of the defendant's privilege and whether such books of record were within the class of testimony covered by the privilege. That such is the law is as well established as the broad restriction on self-incrimination itself.[8] The two essential elements necessary for the violation of the privilege are: first, that the matter must be testimonial; and, second, that there must be compulsion, both of which requirements are satisfied in this case. In the case of *Lisansky v. United States*[9] it was held that although a defendant can keep his books from coming into court by exercising his privilege, he cannot keep persons (government agents to whom he had given his books for inspection)

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[1] 4 Wigmore, Evidence (2d ed. 1923) § 2250.

[2] North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784.

[3] Iowa Code (1935) §§ 11267, 13319; N. J. Comp. Stat. (1910) Evid. § 8.

[4] 116 U. S. 616 (1886).

[5] Holt v. United States, 218 U. S. 245 (1910); Jordon v. State, 32 Miss. 382 (1856).

[6] 4 Wigmore, Evidence § 2264.

[7] 179 Miss. 352, 174 So. 50 (1937).

[8] Boyle v. Smithman, 146 Pa. 225, 23 Atl. 397 (1892).

[9] 31 F. (2d) 846 (C. C. A. 4th, 1929). The court said that the privilege only excused the defendants themselves from bringing in the records and did not bar the introduction of the contents of the books by the officers.

from testifying as to what they saw while going over his records. This is true even though no demand could be made of the defendant in court to produce his books for inspection, nor could the state show evidence of such demand made out of court.[10] Apparently a party is protected against being required to produce the evidence, but not against having it produced by others.[11] In the *Lisansky* case, the state was even allowed to produce photostatic copies of the books.

But when an individual is compelled by statute to keep certain records, and exhibit them upon the demand of a public officer, does not the use of such evidence violate the privilege? In *People v. Creeden*[12] a statute making it a misdemeanor for truck drivers to drive over ten hours in a fourteen hour period, required that such drivers keep a record of their hours, and provided that a failure to produce such record on demand of a public officer was presumptive evidence of violation of the statute. On prosecution of the defendant under the statute, he objected to the admission of his time card in evidence as denying him his right against compulsory self-incrimination. The court said that the document of itself contained nothing incriminatory, as the alleged criminal act was not in filling out the time card but in voluntarily continuing to drive after the entries were made. But it is not necessary that the testimony protected by the privilege be directed to the crime itself; merely that it be of such a nature as to tend to incriminate the defendant. Thus the requirement that the record be exhibited seems to be a clear abrogation of the defendants constitutional privilege, and the reasoning of the court in allowing the admission of such evidence hardly seems sufficient or convincing. The position taken by this court can be defended on the grounds that the documentary evidence sought to be excluded must be personal to the one claiming the privilege.[13] For this reason public books and corporate records are declared to be beyond the scope of the right.[14] Similarly, the admission of records required to be kept in certain businesses has been allowed.[15] In these cases, would it not have been more desirable to admit that the requirement that such records be exhibited is

[10]McKnight v. United States, 115 Fed. 972 (C. C. A. 6th, 1902).

[11]Johnson v. United States, 228 U. S. 457 (1913); Dier v. Banton, 262 U. S. 147 (1923).

[12]281 N. Y. 413, 24 N. E. (2d) 105 (1939).

[13]1 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) § 608. See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 MICH. L. REV. 3, 16.

[14]Wilson v. United States, 221 U. S. 361 (1911); Vaughn v. State, 17 Ala. App. 383, 84 So. 879 (1920).

[15]People v. Shuler, 136 Mich. 161, 98 N. W. 986 (1904) (act required druggists to make weekly detailed report of liquor sales); State v. Davis, 117 Mo. 614, 23 S. W. 759 (1903) (act required druggists to produce record of all prescriptions compounded by them when required); People *ex rel* Ferguson v. Reardon, 197 N. Y. 236, 90 N. E. 829 (1910) (requirement that stock brokers keep records of sales for tax purposes and that such records be inspected by Comptroller is valid, but further provision allowing seaching of private books and records to ascertain whether tax had been paid violated the privilege).

compulsory self-incrimination, but reach the desired results by requiring that the privilege be waived as a condition to conducting such a business? This device has already found a place in our court decisions.[16]

Under the several methods of wording the clauses allowing the privilege, to what extent is protection given? Will the privilege allow the accused to refuse to perform acts which will incriminate him?

Constitutional sanction of the privilege, being merely a recognition and not a new creation, has not altered the scope or tenor of the privilege; it has merely given greater permanence to the traditional rule handed down to us. In most jurisdictions a statute has additionally confirmed the common law privilege, expressly or by implication.[17] Therefore, a majority of the courts say that it is immaterial whether the accused is protected from "testifying", from "furnishing evidence", "giving evidence" or "from being a witness". The courts which have extended the privilege to acts which might incriminate have reached some very interesting conclusions.

In *Magee v. State*,[18] we find an excellent expression of the majority view. The accused was compelled to put his foot in a track found near the place where the crime was alleged to have been committed. The court said that "confessions which are not voluntary, but are made either under the fear of punishment if they are not made or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives and cannot be relied upon as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the cornfield. This resemblance was a fact calculated to aid the jury and fit for their consideration."

Mississippi has taken a clear stand on this problem by restricting the privilege to testimonial compulsion, adopting the language of Mr. Wigmore:[19]

> "An inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness; *i. e.*, upon his testimonial responsibility. That he may in such cases be

[16]In Hess v. Pawloski, 274 U. S. 352 (1927), the technique of "waiver" was employed to validate a statutory provision that the use of the state highways by a nonresident motor vehicle operator be equivalent to the appointment of the Registrar as agent on whom process may be served in any suit growing out of an accident in which the operator should become involved while driving in the state.

[17]MISS. CONST. (1890) Art. III, § 26 provides: "In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself." MISS. CODE ANN. (1930) § 1532 stipulates that privilege applies for matters which will "expose him to criminal prosecution or penalty."

[18]92 Miss. 865, 46 So. 529 (1908).

[19]3 WIGMORE, EVIDENCE §§ 2265, 2266.

> required some times to exercise muscular action—as when he is required to take off his shoes or pull up his sleeve—is immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion. . . . Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. He is not giving evidence. He is not testifying as a witness."

The doctrine that evidence of this type does not represent testimony by the defendant was later re-emphasized in *Underwood v. State*[20] in which the accused while under arrest for homicide voluntarily placed his foot, wearing one of the shoes in question, in a track near the place of the homicide. Evidence of other witnesses as to the measurements of the shoes worn by accused with tracks near the scene of the homicide, which measurements were made while accused was under arrest, was admissible.

The irrationality of the minority view in holding that such "enforced conduct" constitutes "testimonial compulsion" is very well exemplified by a decision rendered several years ago.[21] In this case the court allowed evidence as to footprints made by a sheriff's placing the accused's shoes into the prints subsequent to their forcible removal from the feet of the accused, but, at the same time, refused to allow evidence as to prints made by compelling the accused to place his foot, with shoe on, into a print at the scene of a crime. It is interesting to note that the Supreme Court of Tennessee in 1885 reversed a case in which the trial court refused to permit the accused to exhibit his feet to the jury for comparison with evidence prints, on the ground that this constituted "the best means of ascertaining the truth", which is "the object of the law".[22] In 1875, however, the same court had decided it was a reversible error to merely request an accused to put his foot into a pan of mud so that the resulting impression could be compared with those at the scene of the crime.[23]

The weight of authority supports the proposition that an accused person may be compelled to change his wearing apparel for the purpose of permitting witnesses to a crime to observe the accused when dressed in clothing similar to that worn by the actual perpetrator of the crime.

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[20]108 Miss. 34, 66 So. 285 (1914).

[21]Cooper v. State, 86 Ala. 610, 6 So. 110 (1889); Day v. State, 63 Ga. 667 (1879); State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924).

[22]Lipes v. State, 15 Lea 125, 128 (Tenn. 1885).

[23]Stokes v. State, 64 Tenn. 619 (1875).

In *Richardson v. State*,[24] the court allowed testimony of the chief of police that he required the defendant to put on an overcoat found in his room for the purpose of identification. The court approved the following language of Wigmore:[25]

> "What is obtained from the accused by such action is not testimony about his body, but his body itself. Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

The Supreme Court of Indiana upheld the admissibility of identification testimony even though the accused, at the time of the identification, had over his face a handkerchief placed there by a police officer for the purpose of permitting the identifying witness to observe the accused when dressed the same as the person who committed the act.[26]

Nor does the privilege offer protection to an accused who may be compelled to stand up in court or place himself within full view of the jury.[27]

In an Alabama case applying the constitutional provision "give evidence against himself", this phrase is interpreted as a protection against supplying *any* compulsory evidence, not merely the testimonial variety.[28] It is upon this basis that a distinction is made between the Alabama decisions and those of other states whose constitutions use the word "testify" in place of "give evidence". This contention is supported by a Georgia decision holding it to be error to require accused to stand up and exhibit an amputated leg, for identification purposes.[29]

The mere fact that a person is under arrest at the time he complies with a request of officers to make a specimen of his handwriting for purposes of comparison with a questioned document has been generally held not to affect the admissibility of such a

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[24]168 Miss. 788, 151 So. 190 (1934). See also State v. Bazemore, 193 N. C. 336, 137 S. E. 172 (1927); Bruce v. State, 31 Tex. Cr. Rep. 590, 21 S. W. 681 (1893); Rogers v. State, 180 Wis. 568, 193 N. W. 612 (1923). *Contra*: Ward v. State, 27 Okla, Cr. Rep. 362, 228 Pac. 498 (1924) (While on the stand the defendant was compelled to put on a coat found at the scene of the crime).

[25]4 WIGMORE, EVIDENCE § 2265.

[26]Ross v. State, 20 Ind. 281, 182 N. E. 865 (1932). See also Crenshaw v. State, 255 Ala. 346, 142 So. 669 (1932).

[27]State v. Oschoa, 49 Nev. 194, 242 Pac. 582 (1926) (defendant was forced to remove his coat so that the jury might see scars on his body); People v. Gardner, 144 N. Y. 119, 38 N. E. 1003 (1894); State v. Garrett, 71 N. C. 85 (1874) (defendant was compelled to unwrap a bandaged hand claimed to have been burned); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936); State v. Clark, 156 Wash. 543, 287 Pac. 18 (1930); State v. Fulks, 114 W. Va. 785, 173 S. E. 888 (1934).

[28]Wells v. State, 211 Ala. 616, 101 So. 624 (1924).

[29]Blackwell v. State, 67 Ga. 76 (1881).

standard for any reason of compulsory self-incrimination.[30] Apparently the only appellate court decision passing squarely on the general proposition of the constitutionaltiy of compelling a person to execute a standard of his handwriting is one rendered by the Supreme Court of the Philippine Islands.[31] The case involved a petition for a writ of prohibition to be directed to a trial judge who ordered the petitioner to furnish a specimen of his handwriting for purposes of a comparison being made with certain documents which were alleged to be falsified by the petitioner. In granting the petition, the Supreme Court said:

> "Writing is something more than moving the body, or the hand; writing is not a purely mechanical act, because it requires the application of intelligence and attention; and in the case at bar, writing means that the petitioner herein is to furnish a means to determine whether or not he is the falsifier . . . Except that it is more serious, we believe the present case is similar to that of producing documents or chattels in one's possession."

Thus the court seems to object to this requirement because of the "creation" aspect of the case.

The bodily security of a person has been zealously guarded by the courts of modern times and there is much more reason for protecting this security by the privilege than there is for protecting against compulsion of acts which do not invade the body. To what extent must an accused tolerate a painful or possibly dangerous invasion of the body? For example, may a stomach pump be used on an accused without his consent for the purpose of obtaining a specimen of his stomach contents to disprove his assertions that he last ate a certain kind of food different from that known to have been consumed by the guilty person about the time of the commission of the crime?

One court held that an accused person's privilege against self-incrimination is not violated by his being forced to discharge from his mouth some morphine which he had concealed there when arrested for its possession.[32] Another decided that scrapings from underneath the fingernails of an accused may be removed for analysis without violating any of his constitutional rights or privileges.[33]

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[30]Lefkovitz v. United States, 52 F. (2d) 52 (C. C. A. 2d, 1931) (defendant's signature obtained by trickery); Hall v. State, 171 Ark. 787, 283 S. W. 1026 (1926) (defendant required to write his name on cross-examination); State v. Owens, 167 Wash. 283, 9 P. (2d) 90 (1932); Magnuson v. State, 187 Wis. 122, 203 N. W. 749 (1925).

[31]Beltran v. Samson & Jose, 53 Phil. Is. 570 (1929).

[32]United States v. Ong Siu Hong, 36 Phil. Is. 735 (1917).

[33]State v. McLaughlin, 138 La. 938, 70 So. 925 (1916). See also State v. Casey, 108 Ore. 386, 213 Pac. 771 (1923).

However, these cases involve only slight invasions as distinguished from those in which blood or other fluids or substances are attempted to be removed from within the body.[34]

There is strong dictum in an Ohio decision to the effect that a person accused of driving an automobile while intoxicated cannot be subjected to a urinalysis, or be made to walk a chalk line, or perform other such feats for the purpose of determining the extent of his intoxication.[35] In the opinion of this particular court, the privilege against self-incrimination offers protection from compulsory examinations of this nature. The court stated, however, that if only an "observation" is made of an accused person while he is confined in a hospital or jail then his observers may testify regarding the actions of the accused and also render an opinion as to his intoxication.

In an early New York case involving a prosecution for infanticide,[36] the accused mother was subjected to a medical examination for the purpose of refuting her denial of recent pregnancy. The defendant objected to the introduction of medical testimony to this effect on the ground that it violated her privilege against self-incrimination. Her contention was upheld by the Court of Appeals which considered the examinations tantamount to compelling the defendant to actually testify that she had been pregnant and had given birth to the murdered child.

A contrary view was taken by the Supreme Court of the Philippine Islands when a woman accused of adultery refused to submit to a medical examination to determine whether or not she was pregnant. The court held that the compulsory medical examination did not violate her privilege against self-incrimination.[37]

A number of prosecutions for rape involve the question of whether or not the accused has a venereal disease, and in these cases the courts generally have held that examinations of the sexual organs of the accused are violative of the privilege, unless submission

[34]Underlying the decisions in which the courts have refused to sanction more complicated invasions of bodily security may be the fact that the courts do not wish to pave the way for the practice of allowing unskilled or inefficient police doctors or even the officers themselves to subject the defendants to hazardous examinations.

[35]Booker v. Cincinnati, 5 Ohio L. Rep. 433 (1936).

[36]People v. McCoy, 45 How. Pr. 216 (N. Y. 1873). See also State v. Kowalewsky, 24 Ohio L. Abs. 612 (1937).

[37]Villaflor v. Summers, 41 Phil. Is. 62 (1920). It is difficult to reconcile this case with Beltran v. Samson & Jose, 53 Phil. Is. 570 (1929), cited *supra* note 31, decided by the same court only nine years later. In the latter case the court was extremely zealous in protecting the defendant against furnishing a specimen of his handwriting, but had no objection in the former case to allowing an inspection of the defendant's sexual organs. The basis for making such a distinction may be found in the court's desire to protect the defendant from doing an act which "requires the application of intelligence and attention", as handwriting does. Following such a basis for distinction to its logical conclusion would introduce into the legal arena a new method of confusing the provision against compulsory self-incrimination.

is voluntary.[38] Some decisions have gone to the extent of holding, in effect, that the accused must expressly voice his approval, mere silence and the absence of overt objection being insufficient.[39] Even assuming the unreliability and possibly prejudicial effect of evidence of similar venereal infection in both victim and suspect, the courts are unjustified in denying admissibility on the ground of self-incrimination.[40]

The tendency in recent years has been to construe the privilege strictly. The privilege keeps out relevant evidence, and there seems little justification for broadening its effect by an excess of sentimentalism. It was originally intended to cover testimonial utterances only, and there is ample support, not only in authority but in principle as well, for confining it to that field.

Edgar J. Stephens, Jr.

The Applicability of Foreign Workmen's Compensation Acts in Mississippi Courts

Mississippi is the only state in the Union which does not have a Workmen's Compensation Law. The purpose of this note is to attempt to predict the effect her courts will give to the workmen's compensation laws of other states. This prediction will be based primarily upon prior decisions of the Mississippi Supreme Court together with those of the United States Supreme Court and certain fundamental principles of conflict of laws.

The problem in this state is unique: other forums seek logical reasons for the application of the compensation law of the forum to any given case; the Mississippi courts evidently prefer the application of a foreign Workmen's Compensation Act to that of the tort law of Mississippi even though the case may have many more factual contacts with Mississippi than with the state whose law we apply.

The court has said:

> "Under the Louisiana law his compensation for the injury is certain. Under the law of this state, for two reasons not necessary now to be discussed, his right of recovery

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[38]People v. Akin, 25 Cal. App. 373, 143 Pac. 795 (1914); State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); McManus v. Commonwealth, 264 Ky. 240, 94 S. W. (2d) 609 (1936). *Contra*: United States v. Tan Teng, 23 Phil. Is. 145 (1912).

[39]Bethel v. State, 178 Ark. 277, 10 S. W. (2d) 370 (1928); People v. Corder, 244 Mich. 274, 221 N. W. 309 (1924).

[40]The courts probably realize the undue weight which would be given by the jury to evidence of similar veneral infection in the victim and suspect; and, instead of attempting to cure the evil through instructions as to the proper weight to give such evidence, they refuse to allow the evidence to be admitted, as being a violation of the privilege against self-incrimination. Though this is a sure way to prevent the evils of such evidence which might escape any other scheme, is it wise to permit the privilege to become a "catch-all" to which the courts can resort as a means of disposal for unwanted evidence?

> is uncertain. He is a citizen of Louisiana. Therefore, any doubts as to the applicable law should be solved in favor of the Louisiana law."[1]

There are three major theories as to the law applicable to industrial injuries which occur outside the state in which the contract of employment was made: (1) The tort theory: The injured workman must recover, if at all, under the law of the locus of the injury. (2) The contract theory: Under this theory the compensation law of the state where the contract of employment is made is regarded as part of the contract, and recovery may be had under the law of the place of contracting no matter what the locus of the injury. (3) The "governmental interest" theory, *i. e.*, the state having the most contacts with the parties may apply its own law.[2]

In Mississippi, the case of *Floyd v. Vicksburg Cooperage Co.*,[3] appears to disapprove the contract theory and to adopt the tort theory. In this case the defendant was a Mississippi corporation, the contract of employment was made in Mississippi, and the deceased workman was a resident of Mississippi. Louisiana was connected with the case only in that the deceased was killed while working there. The plaintiff attempted to recover by way of the tort liability imposed on defendant by Mississippi's wrongful death statute.[4] By way of defense the defendant urged that plaintiff's only right of action was under the Louisiana Workmen's Compensation Law. In sustaining the contention of defendant the Supreme Court stated:

> "All the cases agree that, whatever the law of the forum may be, the plaintiff's case must stand, if at all, so far as his right of action is concerned, upon the law of the place where the injury occurred."[5]

On the other hand the court has at times disregarded the tort theory and applied the contract theory. In *Orleans Dredging Co. v. Frazie*,[6] the contract of employment was made in Louisiana between plaintiff and the defendant corporation of Louisiana, for work to be performed in Mississippi. Plaintiff was injured while working on a dredge boat on the Mississippi side of the river. Plaintiff at first attempted to recover under the United States Seamen's Act but the case was dismissed. He then filed an action under the Louisiana Workmen's Compensation Law, but this suit was filed more than one year from the time the injury or the last payment of compensation by the defendant company. The Louisiana compensation law provided that all actions based thereon should

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[1]Orleans Dredging Co. v. Frazie, 173 Miss. 882, 896, 161 So. 699, 701 (1935)
[2]BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) § 398.1; Note (1937) 32 ILL. L. REV. 124.
[3]Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930).
[4]MISS. CODE ANN. (1930) § 510.
[5]Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 576, 126 So. 395, 397 (1930).
[6]Orleans Dredging Co. v. Frazie, 179 Miss. 188, 173 So. 431 (1937).

be begun within one year after the injury or the time of the last payment by the defendant. The Supreme Court of Mississippi, after stating that this action was not on the theory of amendment to the previous action but an adoption of a completely new and different theory, continued: "The one-year limitation in the Louisiana Workmen's Compensation Law therefore controls, and the appellee's cause of action thereunder is barred."

The fact that these two cases are diametrically opposed with respect to both the facts and the language and that no trace of the "governmental interest" theory appears in any Mississippi opinion, sustains the writer's previous contention that Mississippi will voluntarily allow recovery under a foreign compensation act in preference to recovery under our tort law, even though the contacts with this state may be of greater importance than those with the foreign state.

A statement made in the decision of the *Frazie* case[7] on one of its earlier appearances in the Supreme Court summarizes the Mississippi view on the applicability of foreign compensation laws when the contract of employment has been made in a foreign jurisdiction:

> "Since the Louisiana Compensation Law, in respect to a contract made in Louisiana between Louisiana citizens, follows the employee everywhere he may go in the execution of the employment, we are unable to see the materiality of the inquiry whether the contract, when made, contemplated its execution within or without the state, or partly within and partly without."[8]

Full Faith and Credit

When will the full faith and credit clause of the Federal Constitution compel the Mississippi courts to apply the compensation laws of other states? This problem can best be attacked by analysis of the types of compensation laws.

Workmen's Compensation Laws are of two general types: (1) Those which are "elective", *i. e.*, which provide that an injured workman may ask for compensation under the compensation law if he thinks that would be to his best interest. (2) Those which are "exclusive and compulsory", *i. e.*, which provide that the home compensation law applies to all contracts of employment made in the home state and to all injuries suffered therein.

By its various decisions the United States Supreme Court seems to have laid down a rule to the effect that the court of the state of the injury *may* apply its own law unless the compensation act

[7]Orleans Dredging Co. v. Frazie, 173 Miss. 882, 161 So. 699 (1935).
[8]*Id.* at 895, 161 So. at 701.

of the state of the injury is "elective" and the act of the state of contracting is "exclusive and compulsory" as to extrastate injuries.[9]

The possibility that, by suing in more than one state the employee may get the maximum protection under all the possibly applicable statutes, is not precluded even in cases where all those statutes are "compulsory and exclusive".[10]

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[9]This doctrine is a condensation of the four most important cases which have been decided by the United States Supreme Court on this point. These are:

Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932), where the contract of employment was entered into in Vermont, the principal place of the employer's business, and the injury occurred while the employee was temporarily working in New Hampshire. The Vermont compensation statute was of the "exclusive and compulsory" type and the New Hampshire statute was "elective" as between compensation under the statute and under tort liability. Suit was brought in New Hampshire. The Supreme Court held that to allow New Hampshire to apply its own compensation law would be to deny full faith and credit to the compensation law of Vermont.

In Ohio v. Chattanooga Boiler & Tank Co., 289 U. S. 439 (1933), the employee, who had been hired in Tennessee, was injured after going into Ohio temporarily to do some construction work. Suit was commenced in Ohio and the defense was that full faith should be given the Tennessee act. But the Supreme Court of Tennessee had construed its statute, which provided for compensation whether the injury occurred within or without the state, not to provide an "exclusive" or "compulsory" remedy. Distinguishing the Clapper case the court said, "and the full faith and credit clause does not require that greater effect be given the Tennessee statute elsewhere than is given in the courts of that state."

Alaska Packers Ass'n. v. Industrial Accident Comm'n. of Cal., 295 U. S. 532 (1935), was a case in which the contract of employment was entered into in California, the work was to be wholly performed in Alaska, and the injury occurred in Alaska. Suit was brought in California. In this case the Supreme Court established the "governmental interest" doctrine, and decided that California had sufficient interest to permit application of the "exclusive" California Act, and that it did not deny full faith and credit to the Alaska Act by refusing to apply the "exclusive" compensation law of that territory.

In Pacific Employers Ins. Co. v. Industrial Comm'n. of California, 306 U. S. 493 (1939), the contract of employment was made in Massachusetts and the employee was regularly employed there, but was injured while temporarily working in California. The action was brought in California and the courts of that state held that it would not be in violation of the full faith and credit clause to apply its own compensation law in this case. The United States Supreme Court affirmed the finding of the California courts. Although each statute purported to provide an exclusive remedy for the injury in question, the application of the conflicting Massachusetts law would be contrary to the public policy of California, as expressed by its courts and embodied in its act, by denying California physicians and hospitals the certainty of receiving pay for helping injured employees granted by the California Act and possibly by requiring them to go to another state in order to collect their charges and fees; hence California was not compelled to give full faith and credit to the Massachusetts Act. The court also mentioned the right of California to specify the type of protection it will give to persons working within her borders. See also, Note (1939) 26 VA. L. REV. 95.

[10]BEALE, TREATISE ON THE CONFLICT OF LAWS, (1935) § 403.1, states: "Recovery may be had on the Act of the place of hiring although the injured person has already recovered, either on the Act or at the common law, or has made composition, in the state of injury. After recovery in one state, suit may be brought in the other state; but in the judgment credit should be given for the amount already recovered."

As might well be expected, the attitude of the Mississippi court, causes little trouble with the full faith and credit clause, for that attitude is deliberately to seek to apply the compensation acts of other states where contracts[11] may be established with those states.

In the first decision of the *Frazie* case the court said:

> "It remains only to be added that the court will not dismiss the appellee and require him to go to Louisiana to propound his claim. It is settled that the courts of this state will recognize and enforce the Louisiana Workmen's Compensation Law; and this is now the general rule everywhere as to the enforcement of compensation laws. Appellee says that since the injury occurred in this state, we are not bound to apply the Louisiana law. That we must do so, under the facts of this case, we regard as settled in the *Bradford, etc., v. Clapper case,* 286 U. S. 145."[12]

In the case of *Dunn Construction Co. v. Bourne*[13] the parties were citizens of Louisiana, the contract of employment was made in Louisiana and the injury was suffered in that state. The suit was brought in chancery in Mississippi. The Supreme Court held:

> "We have previously held that the Workmen's Compensation Act created a new right of action and that the one year period within which to begin suit was a substantive part of the right and not a mere limitation. This is in harmony with the Louisiana construction of the one year period; indeed, we merely applied their construction.
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> "As we view it then, this twelve month statute contained in section 31 is such a limitation upon the right to bring the action that it will not only be enforced in this state, but, as we understand it, everywhere."[14]

The Supreme Court of the United States has held that a state cannot create a cause of action of a type which is normally transitory and provide that it shall not be transitory.[15] The *Dunn* case is noteworthy in that therein the Mississippi court states that if a foreign compensation statute creates a cause of action, this cause of action must be transitory and the state whose legislature passed the

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[11]Some of the important "contacts" in workmen's compensation cases are set out in a Note, (1939) 34 ILL. L. REV. 226, 229. "Other influential factors would seem to be: The permanence with which the business has been established in the state; the length of time the deceased has been there employed; whether insurance was carried in the state; the contract itself, *i. e.*, did it contemplate continuous employment?"

[12]173 Miss. 882, 896, 161 So. 699, 702 (1935).

[13]172 Miss. 620, 159 So. 841 (1935).

[14]*Id.* at 620, 159 So. at 842.

[15]Tennessee Coal, I. and R. Co. v. George, 233 U. S. 354 (1913); Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55 (1909).

law cannot limit its application to that state alone. This case apparently extends the federal constitutional doctrine to include administrative remedies.

Again in *McArthur v. Maryland Casualty Co.*[16] the majority opinion stated:

> "In administering the laws of the state of Louisiana, of course, we are bound by the construction given such laws by the Supreme Court of Louisiana. In fact, it is well settled that the construction of a statute by the courts of the state whose legislature enacted it, will be adopted by the courts of this state."

But in the opinion of Smith, C. J., dissenting:[17]

> "If this statute confers a right of action it should be enforced by the courts of this state unless so to do would violate its public policy; but not if it simply provides a procedure for the enforcement of a right of action otherwise conferred. . . . It is true that the Louisiana courts while saying that the statute confers a right of action have also said that it is remedial and procedural in character. This latter language was not used in connection with any conflict of laws rule, but mainly in cases wherein the validity and retroactive character of the statute was under consideration; but aside from that the universal rule is that the court of the forum determines for itself whether the right given by a foreign statute is one of substance or procedure."

If the foreign compensation law is of the contractual type and is exclusive and the only contact with Mississippi is the injury here, the doctrine of the *Bradford* case[18] will apply and compel Mississippi to give full faith and credit to this foreign compensation law. Mississippi courts can escape application of this law only by asserting that Mississippi has no machinery for enforcing such a statute;[19] forcing the plaintiff to go to the state where the contract of employment was made for recovery.[20]

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[16]184 Miss. 663, 683, 186 So. 305, 307 (1938). See also, Comment (1938) 11 MISS. L. J. 234.

[17]*Id.* at 691, 186 So. at 310.

[18]286 U. S. 145 (1932).

[19]In Burkett v. Globe Indemnity Co., 182 Miss. 423, 440, 181 So. 316, 319 (1938), McGowen, J., speaking for the court said: "When a statute of another state confers a right of action that is substantive this court will enforce it where it has the machinery to do so."

[20]If the forum and the locus of the contract both have acts which provide they are exclusive and compulsory as to all injuries suffered in the state or under a contract made in the state, the rule of the Bradford case will not apply, and the state where suit is brought may contend that it would be against its public policy to apply the foreign statute where its own statute provided that it was exclusive. See Pacific Employers Ins. Co. v. Industrial Comm'n of Cal., 306 U. S. 493 (1939).

What Compensation Laws Can Mississippi Apply

Only six of the states have compensation laws which are administered through the courts.[21] Therefore the question arises whether Mississippi has the machinery with which to apply those compensation laws which are to be administered by boards and commissions. Beale and the *Restatement of Conflicts* have both taken the view, with respect to compensation laws which are administered by boards or commissions, that until some award has been made by this board or commission the injured workman has no right which is capable of being the subject of suit in an ordinary court.[22]

The Supreme Court of Mississippi has taken the opposite view. In *Floyd v. Vicksburg Cooperage Co.*,[23] the question was whether the right and remedy in the Workmen's Compensation Law of Louisiana are so completely blended, so inseparable that no court other than the Louisiana court could give relief. The court stated:[24]

> ". . . it is well settled that, where the statute does not create a new right, or if a new right, the remedy is separable, the remedy prescribed will, in the forum of another state, be regarded as cumulative and not as exclusive. . . . The Workmen's Compensation Law of Louisiana does not create any new right with respect to the liability for death by wrongful act. . . . it merely fixes a definite maximum and minimum of recovery for death and the manner of its payment, and definitely nominates the surviving beneficiaries. The Louisiana law governs, of course, the measure of damages, for this pertains to the right rather than the remedy."

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[21]Alabama, Louisiana, New Hampshire, New Mexico, Tennessee and Wyoming. It is noteworthy that Alabama, Louisiana and Tennessee, the states whose compensation laws Mississippi is most likely to have contact with, are among those having court administered acts.

[22]"A few states have statutes like the ordinary compensation acts except that courts of law administer the act instead of a special administrator or board. It seems clear that the act is nevertheless a compensation act. If it is not a compensation act suit may be brought in any state, and in one case it has been held by a federal district court that suit may be brought for violation of the Louisiana Act, an act of this nature, in another state. Other cases, however, have taken the opposite view, and it seems the correct one, for it is in the nature of a compensation act that there shall be no claim for an unfixed amount but only for the amount fixed by the tribunal in which the case is to be taken up." BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) p. 1317.

"A Workmen's Compensation Act usually calls for the award of compensation by a particular administrative tribunal provided by the Act. Frequently, the provisions of the act are such that, until the award is made, there is no right in the injured workman which is capable of being the subject of suit in an ordinary court. Even if under the particular act the injured workman has a claim against the employe rather than a right to make application for an award to a local tribunal, the difficulties of procedure may make it impracticable for a court in another state to attempt to administer the act. Therefore, no award is ordinarily made under the provisions of a Workmen's Compensation Act of a foreign state." RESTATEMENT, CONFLICT OF LAWS (1934) p. 485.

[23]156 Miss. 567, 126 So. 395 (1930).

[24]*Id.* at 578, 126 So. at 398.

On the question whether the court could handle the complicated plan of payment by installments incorporated in the Louisiana compensation law, the court said:[25]

> "It not being shown to us that this cannot be done, we must at least say that we cannot turn the plaintiffs out of court with no more before us than the present record. Moreover, and in the last resort, the cause can be transferred to the chancery court. That court, by reason of its plenary power to mould its decrees so as to conform to the full limits of the details of any justiciable right, can make and enforce in all essential respects the same orders and decrees that could the courts in Louisiana, were the case there."

This is very strong language and would seem to indicate that Mississippi could handle any compensation act no matter what the prescribed method of administration, by transferring the case to the chancery court. It is well to note, however, that this cause of action arose in a state which had a compensation law which was court administered.

Continuing, the court put this limitation on its power to cope with foreign compensation acts:

> "It is only necessary, since we have full jurisdiction of the parties, that consistently with our procedural law, and by the use of the means it affords, either in the circuit court or the chancery court, we are able to do substantial justice between the parties under the rights existing by virtue of the foreign substantive law."[26]

By use of this limitation the courts could justify a refusal to accept any given case which might involve the compensation law of some other state. However, the present policy of Mississippi is to accept all such cases.

Compensation Laws and Public Policy

Is the enforcement of foreign compensation laws against the public policy of Mississippi?

In one case[27] Smith, C. J., dissenting, raised the question whether the enforcement of the Louisiana Compensation Law is not enforcement of a law which is against the public policy of Mississippi. As evidence that such a law is against the local policy he cites the numerous refusals of the legislature to pass a compensation law. His opinion seems to be that compensation laws are against the public policy of Mississippi, and that therefore the local courts are not compelled to enforce such a law, although admitting it to be a foreign created substantive right.

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[25] *Id.* at 579, 126 So. at 398.
[26] *Id.* at 580, 126 So. at 398.
[27] Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930).

The majority opinion on this question is to the contrary: In explaining that the theory of workmen's compensation was not contrary to our theory of recovery for wrongful death, and thus not against the local public policy, Judge Griffith stated:

> "But, in order that the stated rule shall apply, it is necessary that the foreign law shall be repugnant to the settled sentiments of good morals or natural justice of the state of the forum or will be injurious to its own citizens."[28]

The conclusion is that the Supreme Court will probably never find a court administered compensation law to be against the public policy of Mississippi.

Self-Limiting Compensation Laws

What will Mississippi do with a compensation law which within itself provides that it is to be applicable only in certain situations? Apparently there are no Mississippi cases on this problem.

There is no objection to the maintenance of a "cause of action" in the courts of Mississippi based on a statute of a foreign state which statute does not contravene any public policy of Mississippi. The difficulty with this situation is that many of the workmen's compensation laws do not provide any independent "cause of action" but provide only an administrative remedy for a substantive right previously existing.

Some of the compensation laws provide that no recovery can be had thereunder for injuries occurring outside the state.[29] Undoubtedly Mississippi would not attempt to apply such a statute as this.

Other states have statutes which do not expressly provide for extraterritorial application.[30] Generally, however, these statutes have been interpreted by the home state as having extraterritorial applicability.[31] Unless other difficulties were met the Mississippi courts can and probably will apply compensation statutes of this type.[32]

Still other states have statutes which provide within themselves for extraterritorial application.[33] Other points being favorable, certainly no difficulty will be met in the entertainment of an action based on this type statute. This conclusion arises *a fortiori* from the conclusion reached in the preceding paragraph.

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[28] *Id.* at 580, 126 So. at 398.

[29] N. D. COMP. LAWS ANN., (Supp. 1925) § 396 a(17).

[30] Arizona, Colorado, Connecticut, Iowa, Louisiana, Michigan, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Rhode Island, Washington, West Virginia, Wisconsin, and Wyoming.

[31] All of the above named states, note 30 *supra*, except Oklahoma, have construed their statutes to have extraterritorial application.

[32] Orleans Dredging Co. v. Frazie, 173 Miss. 882, 161 So. 699 (1935).

[33] California, Georgia, Illinois, Maine, Tennessee, Texas and Virginia.

Conclusions

(1) The public policy of Mississippi is not opposed to the application of foreign workmen's compensation acts where there is an important contact with Mississippi and with the foreign state.[34]

(2) Mississippi will provide a forum in cases where all the contacts are with a foreign state or states.[35]

(3) Mississippi courts will apply the foreign compensation law if the injury occurs in the foreign state and the contract of employment was made in Mississippi,[36] or if the contract of employment was made in the foreign state and the injury occurred in Mississippi.[37]

(4) Mississippi recognizes that the full faith and credit clause of the Federal Constitution may compel her courts to recognize and enforce the compensation laws of foreign states.[38]

(5) Mississippi courts are apparently prepared to enforce any type of remedy provided by a foreign compensation statute.[39]

(6) The theory of workmen's compensation laws is not opposed to the public policy of Mississippi.[40]

John W. Whitten

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[34]Orleans Dredging Co. v. Frazie, 173 Miss. 882, 161 So. 699 (1935).
[35]Dunn Const. Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935).
[36]Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930).
[37]Orleans Dredging Co. v. Frazie, 179 Miss. 188, 173 So. 431 (1937).
[38]Orleans Dredging Co. v. Frazie, 173 Miss. 882, 161 So. 699 (1935).
[39]Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 579, 126 So. 395, 398 (1930).
[40]*Id.* at 579, 126 So. at 398.

RECENT DECISIONS

APPEAL & ERROR—PARTIAL REVERSAL AND REMAND FOR NEW TRIAL ON THE ISSUE OF DAMAGES ALONE—GROSSLY INADEQUATE DAMAGES AS EVIDENCE OF PASSION, PREJUDICE OR CORRUPTION OF THE JURY.

In the action for damages for the destruction of an eye caused by the negligence of an employer there was a sharp conflict of evidence on the trial upon the issue of negligence of the defendant, but no conflict as to the fact of destruction of the eye and no evidence of contributory negligence on the part of plaintiff. The jury returned a verdict for plaintiff for a grossly inadequate sum. Both parties appealed: defendant from the judgment for plaintiff; and plaintiff on the ground of inadequacy of damages. HELD: (*On defendant's appeal*): The judgment would be affirmed on the question of liability, as the verdict was not "against the overwhelming weight of the evidence". HELD: (*On plaintiff's cross-appeal*): The judgment would be reversed for a new trial on the question of damages only. Faulkner v. Middleton, 188 So. 565 (Miss. 1939) (*suggestion of error overruled*—190 So. 910).

In the opinion on the second point, the court, speaking through McGowen, J., said:

> "We think the amount of the verdict was wholly inadequate, and that the verdict was evidently induced by passion and prejudice on the part of the jury, which necessitates a new trial on the question of damages.
>
> The jury rendered a verdict in favor of Middleton and thereby decided that he lost his eye as a result of the negligence of the master."[1]

These two statements appear to embody the reasoning upon which the Mississippi Supreme Court bases its practice of reversing judgments for plaintiffs upon the question of damages alone.[2]

Faulkner v. Middleton, the latest case on the point, and the two cases therein cited as authority, *Scott v. Y. & M. V. R. R.*[3] and *Whitehead v. Newton Oil & Mfg. Co.*,[4] make it seem that the process is purely logical and is based upon the simple statements quoted from the instant case. The reasoning appears to be as follows: The jury has found for the plaintiff. Therefore, it has found that defendant was negligent. The jury has found that plaintiff suffered damages to a certain amount. This amount is wholly inadequate. Therefore, it is evident that the jury was, in some way, improperly influenced in favor of defendant.

Is this logical? Does it not contain an unexpressed premise to the effect that in all matters except the determination of the amount of damages the jury did its duty as an impartial trier of fact? Is the inquiry of the appellate

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[1]188 So. at 566.

[2]The opinion in the instant case reproduces nearly verbatim the language of the court in the two cases cited therein. See Scott v. Y. & M. V. R. R., 103 Miss. 522, 523, 60 So. 215 (1912); Whitehead v. Newton Oil & Mfg. Co., 105 Miss. 711, 715, 63 So. 219, 220 (1913).

[3]103 Miss. 522, 60 So. 215 (1912).

[4]105 Miss. 711, 63 So. 219 (1913).

court not, rather, directed to determining the propriety of including that premise in the course of the reasoning? The problem before the court is: Did the jury act as an impartial trier of fact or did it fail in some one or more particulars?

When the jury returns a verdict for the plaintiff, but gives grossly inadequate damages, there are several alternative reasons for such an action.

(1) The jury may have misunderstood the instructions of the court upon the measure of damages.

(2) The jury may have understood the instructions on the measure of damages, but have innocently erred in calculation, or have inadvertently omitted some one or more elements of damages.

(3) The jury may have been convinced that the plaintiff was entitled to a verdict, but have been swayed by passion, prejudice or corruption operating against him, and have salved their consciences by giving him some, but not all, of the damages to which he was entitled.

(4) The jury may have been convinced that the defendant was entitled to a verdict, but have been swayed by passion, prejudice or corruption operating against him, and have compromised with their consciences by giving the plaintiff only a small sum as damages.

(5) The jury may have been hopelessly split on the issue of liability and have compromised on a small verdict.

In situations (1), (2) and (3) it is entirely proper to reverse and remand upon the issue of damages alone. By hypothesis, the mistake or the misconduct of the jury operated against the plaintiff and the verdict on the issue of liability was proper.

In situations (4) and (5), on the other hand, it is improper to remand for a partial new trial. Whether the fact be that the jury was convinced that the defendant was entitled to a verdict, or that the jury was hopelessly split on the issue of liability, the misconduct has operated against the defendant and no verdict for plaintiff is acceptable. The defendant is entitled at least to a new trial on the issue of liability.

When the appellate court comes to consider the case, all it has before it is the record. If a good record has been made up it may well be possible for the court to determine that the inadequacy of damages is to be assigned to one of the five alternatives set out above. But it seems that the determination should be made upon some basis other than that the court "is committed to the practice . . . of reversing for another trial on the issue of damages only."[5]

Let us suppose that the jury returns a verdict of nominal damages for the plaintiff, in spite of uncontradicted evidence of substantial damages and a complete lack of evidence of contributory negligence. This may indicate that some improper influence operated upon the jury against plaintiff. It seems, however, doubtful that the jury would bring in a verdict which declares defendant at fault and not go the whole hog and give the plaintiff substantial damages in order to help the plaintiff or make the defendant suffer. On the other hand, it may indicate that some improper influence operated against the

[5]Faulkner v. Middleton, 188 So. 565, 566 (Miss. 1939).

defendant and that the jurors were able to stretch their consciences sufficiently to find him at fault, but not sufficiently to charge him with substantial damages.

It is submitted that so great an uncertainty is inherent in this situation that the only proper course is to reverse and remand for an entire new trial, unless it is clear that no reasonable jury could have found the defendant not at fault:—in which case it is evident that the passion, prejudice or corruption operated only against the plaintiff and a partial new trial on the issue of damages alone is proper.[6]

Let us suppose that the jury returns a verdict for plaintiff, with substantial, but grossly inadequate, damages. Here is a little more evidence that the improper influence operated against the plaintiff. The jury has gone as far as to charge the defendant with a substantial sum of money. In such a case is seems proper to reverse and remand for a partial new trial if the overwhelming weight of the evidence was in favor of the verdict of liability. Such a course is proper if the appellate court is *convinced*, from the record, that the jury's finding of fault was correct.[7] This course is, *a fortiori*, correct if the jury has made a special finding against the defendant on the issue of fault.[8] If, on the other hand, the appellate court is not *convinced* that the issue of fault was found correctly against the defendant, but there was a preponderance of evidence pointing in that direction, it begins to be difficult to determine which aspect of the verdict reflects passion, prejudice or corruption. The fact that a verdict was returned for plaintiff may indicate that the improper consideration operated in favor of defendant. The fact that the damages are grossly inadequate may indicate that the impropriety operated in favor of the plaintiff.

It is submitted that these are proper cases for the exercise of the sound discretion of the appellate court to determine whether there should be a partial or total remand.[9]

If there was a sharp conflict of evidence on the trial, so that the most the appellate court can say is that the verdict was not against the weight of the evidence, or, as in the principal case, not "against the overwhelming weight of the evidence", it is very dangerous to attempt to split the question into independent issues of fault and damages and to conclude that the improper consideration affected only the latter. Where, as in the instant case, the defendant appeals on the issue of liability and the plaintiff on the issue of damages, there may well be a tendency for the appellate court to consider the appeals independently, particularly if the defendant does not argue that the amount of the verdict shows that the improper influence operated against him. This tendency should, however, be avoided, for the power to remand for partial new trial:

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[6]Donnatin v. Union Hdw. & Metal Co., 38 Cal. App. 12, 177 Pac. 845 (1918).

[7]The two cases upon which the court relied in the principal case appear to belong in this category. See discussion in the text, p. 504, *infra*, at notes 14-17.

[8]Richardson v. Weare, 62 N. H. 80 (1882).

[9]Rawle v. McIlhenny, 163 Va. 735, 177 S. E. 214, 98 A. L. R. 930 (1934).

> "is a power to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which has crept into one element of the verdict by no means can have affected its other elements."[10]

In the instant case the court said that "Since the decision in *Scott v. Yazoo & M. V. R. Co.*,[11] this court is committed to the practice of affirming the case on the question of liability, and reversing for another trial on the question of damages only. On the question of the inadequacy of the damages in this case, and illuminative of our reason for reversing the case on damages only, see *Whitehead v. Newton Oil & Mfg. Co.*"[12]

It is respectfully submitted that the Mississippi Supreme Court was not *committed* to this practice before the decision in the instant case; and that if it is now so committed, the commitment is to be based upon that decision.

The only citations in the opinion in *Faulkner v. Middleton*[13] were of the two earlier cases, several times mentioned in this comment. Since that is so, an examination of the facts and opinions in those cases is necessary in order to determine whether the court was so committed by either of these decisions.

In the earlier of the two cases, *Scott v. Yazoo & M. V. R. Co.*,[14] upon which the court expressly relied, there is no indication that there was any conflict of evidence on the issue of fault, there was no evidence of contributory negligence, and, in the opinion on rehearing,[15] Smith, C. J., said:

> "The right to limit the issues when ordering a new trial should be exercised only when it is clear that no injustice will result from so doing. Particularly is this true when the only error in the verdict is in the amount of damages assessed, and it appears that this error . . . was committed solely by the jury itself after retiring to consider its verdict; for in that case it is more difficult to say that the entire verdict was not affected by the same cause from which resulted the error in the amount of damages.[16]

In the latter of the two cases, *Whitehead v. Newton Oil & Mfg. Co.*,[17] the evidence of fault on the part of the defendant was very clear and there was no evidence of contributory negligence.

Neither of these decisions appears to have committed the court to a partial remand in a case in which the evidence was in sharp conflict on the issue of fault, and the verdict was, on that issue, merely not "against the overwhelming weight of the evidence".

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[10]See Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588 (1912). To the same effect see Schuerholz v. Roach, 58 F. (2d) 32 (C. C. A. 4th, 1932); Juliano v. Abeles, 114 N. J. L. 510, 177 Atl. 666 (1935); Munder v. Johnson, 102 W. Va. 436, 135 S. E. 832 (1926). An excellent annotation on this subject is to be found in note (1935) 98 A. L. R. 941, 944-49.

[11]103 Miss. 522, 60 So. 215 (1912).

[12]105 Miss. 711, 63 So. 219 (1913).

[13]188 So. 565, 566.

[14]103 Miss. 522, 60 So. 215 (1912).

[15]This opinion was directed in the main to the establishment of the right of the Mississippi Supreme Court to order a remand on the issue of damages alone.

[16]108 Miss. 871, 897, 67 So. 491, 498 (1914).

[17]105 Miss. 711, 63 So. 215 (1913).

The writer was impelled to attempt a careful analysis of the problems here involved, and of the preferable solutions, by an experience which he had when sitting on a jury before he took up the study of law.

The case was in tort for a negligent injury. The evidence was in sharp conflict on all three issues, negligence, contributory negligence and extent of injury. From the beginning of the deliberations, three jurors stood fast for a verdict in the amount of the *ad damnum*, $10,000, saying frankly that they did not care whether the defendant was guilty of negligence or not, nor whether the plaintiff was guilty of contributory negligence[18] or not. The reason for this attitude was that the jury knew that defendant was insured, and these three maintained that plaintiff had been badly hurt and that the insurance company could stand the loss a great deal better than she could. Three other jurors stood fast for a verdict for defendant upon the ground that negligence had not been shown, and that, even if defendant had been negligent so had the plaintiff. The other six jurors wavered between various verdicts for plaintiff and a verdict for defendant.

We got the case at noon and had lunch at the county's expense. After lunch we deliberated for five hours and some minutes, hopelessly deadlocked on the issue of liability. As it began getting on toward time to eat again we found a compromise formula and brought in a verdict for plaintiff for her actual out-of-pocket expenses only, doctor's bills, *etc.* None of us was conscious of serious misconduct in thus reaching a compromise verdict. Our underlying motive, expressed and agreed to by all of us, was that the case had already taken two days at great expense to both parties and that it would be foolish to come in with a disagreement and thus to cause further expense to both parties, only for another jury to arrive at the same hopeless conflict as to the proper verdict.[19] Study of the law has, of course, developed in the writer a sense of guilt and regret that he did not sit pat on his convictions all night if necessary.

Ever since that time the writer has had a suspicion, which he feels is not unjustified, that a considerable proportion of verdicts for substantial but inadequate, even though not grossly inadequate, damages arises from some compromise among the jurors.

It is interesting to note that there has been recently reported a case in which the same influence—desire to reach a verdict by compromise, if necessary—or some other improper influence operated upon a jury in favor of the plaintiff. After reversal of an inadequate judgment for plaintiff and total remand, the cause tried in *Schuerholz v. Roach*[20] had a new trial. This second trial resulted in a verdict for defendant, a result offering fairly good evidence that a remand on the issue of damages alone would have been unjust to the defendant.

Charles W. Taintor, II

[18]The case arose in Massachusetts where contributory negligence is an absolute bar.

[19]A desire to be completely candid compels the admission that the jury was undoubtedly influenced in its desire to reach a verdict by the facts that the jury room was very uncomfortable and the food supplied by the county was not good.

[20]58 F. (2d) 32 (C. C. A. 4th, 1932).

BILLS AND NOTES—DISCHARGE OF ACCOMMODATION MAKER BY EXTENSION OF TIME—HOLDER IN DUE COURSE ACQUIRING KNOWLEDGE OF ACCOMMODATION AFTER PURCHASE.

In order to enable one Hand to obtain a loan of $1,577.52 from a bank, Hederman made a note for that amount, payable to Hand. Hederman did not owe Hand presently or prospectively, and the transaction was solely for the accommodation of Hand. On Hand's giving his own personal note for the desired amount, the bank made the loan, taking Hederman's note to Hand as collateral therefor. At the time the loan was made, the bank was unaware of the accommodation character of the maker and was under the impression that Hederman's note to Hand had been given for value. At a later date Hand informed the bank that Hederman's note was given solely for Hand's accommodation. After having acquired knowledge of the actual character of the paper, the bank, at the request of Hand and without the knowledge or consent of Hederman, agreed with Hand to extend the time of payment. HELD: Hederman was discharged from all liability because of the extension of time. *Hederman v. Cox*, 193 So. 19 (Miss. 1940).

Before the passage of the Negotiable Instruments Law it was generally held that an accommodation maker whose character was known to the holder at the time he became such was completely discharged by a binding extension of time[1] given by the holder to the party known by him to be the principal debtor.[2] This policy was based on one of the well settled doctrines of the law of suretyship.[3] However, a majority of the courts considering the question since the passage of the N. I. L. have construed that legislation as abrogating the suretyship defense of an extension of time.[4] The argument commonly advanced as supporting this construction is that, an accommodation maker being *primarily* liable,[5] he can be discharged only in the methods prescribed by Section 119[6] of the act for the discharge of the instrument itself. This section being treated as exclusive and as not providing for a discharge of the instrument by an extension of time, it follows that an accommodation maker is not

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[1]It was necessary that there be a consideration for the agreement to extend time. ARANT, SURETYSHIP AND GUARANTY (1931) § 68; STEARNS, SURETYSHIP (4th ed. 1934) § 81. Alabama Fidelity & Casualty Co. v. Alabama Fuel & Iron Co., 190 Ala. 397, 67 So. 318 (1914); Hensler v. Watts, 113 Iowa 741, 84 N. W. 666 (1900).

[2]3DANIELS, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 1511; 4 WILLISTON, CONTRACTS (rev. ed. 1936) § 1259; 3 R. C. L. p. 1275, § 505.

[3]ARANT, SURETYSHIP § 68. STEARNS, SURETYSHIP § 81.

[4]BRANNAN, NEGOTIABLE INSTRUMENT LAW ANNOTATED (Beutel's ed. 1932) § 119 (4); STEARNS, SURETYSHIP § 91a; Note (1927) 48 A. L. R. 715.

[5]N. I. L. § 29, MISS. CODE ANN. (1930) § 2685 provides: "An accommodation party is one who has signed the instrument as maker . . . without receiving value therefor and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

[6]MISS. CODE ANN. (1930) § 2775, which provides: "A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor. (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation. (3) By the intentional cancellation thereof by the holder. (4) By any other act which will discharge a simple contract for the payment of money. (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

discharged by such extension.[7] The fact that the act specifically includes extension of time as a method of discharge of parties *secondarily* liable[8] has been considered as adding force to this contention.[9] Various other interpretations of the N. I. L. that have been urged in support of the majority view are: (1) The act makes no provision for the relation of principal and surety;[10] (2) An accommodation maker is by Section 29[11] of the act under no different liability than that of a maker who has received value;[12] (3) In order to achieve uniformity, the act should be construed as nearly as possible without reference to rules of law not expressed therein;[13] (4) Since the acceptance of this view has been adopted with virtual unanimity, the purpose of the enactment of the statute—to bring about uniformity in the law of negotiable instruments—requires that the decisions should follow the main line of construction laid down, even though the setting aside of the common-law rule was not required by the statute.[14]

But these lines of reasoning and the decisions reached thereby have met with adverse criticism, and the holding in the instant case that this suretyship defense was not abrogated by the N. I. L. has the support of reputable theorists[15] as well as of a number of courts.[16] Professor Brannan vigorously disagrees with the prevailing view and submits that the decisions in these cases are at variance with the well established laws of suretyship and are not re-

[7]Jamesson v. Citizens Nat. Bank, 130 Md. 75, 99 Atl. 994 (1917); Vernon Center State Bank v. Mangelsen, 166 Minn. 472, 208 N. W. 186 (1926); First Nat. Bank v. Meyer. 30 N. D. 388, 152 N. W. 657 (1915); Richards v. Market Exchange Bank Co., 81 Ohio St. 348, 90 N. E. 1000 (1910); Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426 (1907).

[8]See N. I. L. § 120, MISS. CODE ANN. (1930) § 2776.

[9]First State Bank of Mortonville v. Williams, 164 Ky. 143, 175 S. W. 10 (1915); Vanderford v. Farmer's Nat. Bank, 105 Md. 164, 66 Atl. 47 (1907); Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912); Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426 (1907).

[10]Cowan v. Ramsey, 15 Ariz. 533, 140 Pac. 501 (1914); Fox v. Terre Haute Nat. Bank, 78 Ind. App. 666, 129 N. E. 33 (1920); Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912).

[11]See note 5 *supra.*

[12]Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912); First State Bank v. Lang, 55 Mont. 146, 174 Pac. 597 (1918); Oklahoma State Bank v. Seaton, 60 Okla. 99, 170 Pac. 477 (1918); Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426 (1907).

[13]Vanderford v. Farmer's Nat. Bank, 105 Md. 164, 66 Atl. 47 (1907); Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426 (1907); Graham v. Shepherd, 136 Tenn. 418, 189 S. W. 867 (1916).

[14]Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912). In Taylor v. Ross, 129 Miss. 536, 543, 92 So. 637, 638 (1922), the Mississippi court accepted this policy as being sound: "It is highly important that the decisions of all courts construing the Uniform Negotiable Instrument Law be harmonious, and to conform to the decisions of the other states passing upon this phase of the law requires that the chancellor's judgment be affirmed."

[15]BRANNAN, *loc. cit supra* note 4; Greeley, *The Uniform Negotiable Instruments Law in the Light of Recent Criticism* (1915) 10 ILL. L. REV. 265, 277; Hening, *The Uniform Negotiable Instruments Law, Is it Producing Uniformity and Certainty in the Law Merchant* (1911) 59 U. OF PA. L. REV. 532; Raymond, *Suretyship at Law Merchant* (1916) 30 HARV. L. REV. 141.

[16]Ray v. Summerlin, 211 Ala. 334, 100 So. 482 (1924); First Nat. Bank v. Holding, 90 Mont. 529, 4 P. (2d) 709 (1931); Long v. Mason, 273 Mo. 266, 200 S. W. 1062 (1918); Strather v. Wilkinson, 90 Okla. 247, 216 Pac. 436 (1923); Howth v. Case Threshing Machine Co., 116 Tex. 434, 293 S. W. 800 (1926). For further citations see BRANNAN, *loc. cit. supra* note 4; 4 WILLISTON, CONTRACTS § 1260, n. 3; Note (1927) 48 A. L. R. 715, 725.

quired by the provisions of the N. I. L. He suggests that the discharge of the accommodation maker by an extension of time granted to the principal debtor is covered by section 119(4)[17] of the act, and further proposes that, if this is not so, since the discharge of the accommodation maker is neither a discharge of the instrument nor a discharge of a party secondarily liable, it should be regarded as an omitted case and therefore governed by the law merchant under section 196.[18] Another theory on which various courts have released the surety is that a holder who takes the instrument with knowledge of the accommodation character of the maker is not a holder in due course, and that for this reason suretyship defenses can be set up against him just as if the instrument were non-negotiable.[19]

The decision in the case under consideration that the N. I. L. did not abolish the accommodation maker's defense of an extension of time, while contrary to the prevailing view, is not without logic and justification.[20] In the instant case, however, the court held in addition that this suretyship defense is available as against a holder who, although having knowledge of the character of the maker at the time the extension was made, took the instrument in due course and without knowledge of the accommodation. This holding is more questionable. Under the law merchant some jurisdictions took the view that was taken in the instant case.[21] The N. I. L. has been interpreted as requiring the same decision.[22] These decisions are open to criticism and certainly the majority of the courts passing on the question since the passage of the N. I. L. have held that the accommodation maker is not discharged in such a case.[23] And Beutel, although agreeing with Brannan that the N. I. L. should not be construed as annulling the suretyship defense of an extension of time, recog-

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[17]See note 6 *supra*. This particular section provides for discharge of a negotiable instrument by "any other act which will discharge a simple contract for the payment of money."

[18]BRANNAN, *loc cit. supra* note 4. N. I. L. § 196, MISS. CODE ANN. (1930) § 2852, provides: "In any case not provided for in this chapter, the rules of law and equity including the law merchant shall govern."

[19]Fullerton Lbr. Co. v. Snouffler, 139 Iowa 176, 117 N. W. 50 (1908); First Nat. Bank v. Holding, 90 Mont. 529, 4 P. (2d) 709 (1931); Strother v. Wilkinson, 90 Okla. 247, 216 Pac. 436 (1923); Howth v. Case Threshing Machine Co., 116 Tex. 434, 293 S. W. 800 (1927).

[20]See Andrews and Lenoir, *An Interpretation of Sections* 119, 120, *and* 196 *of the Negotiable Instruments Law* (1935) 8 MISS. L. J. 165; Ousley, *Extension of Time for Payment as Releasing Sureties on Notes in Kentucky* (1934) 22 KY. L. J. 371; Notes (1925) 38 HARV. L. REV. 954, (1931); 44 HARV. L. REV. 1000.

[21]Lauman v. Nichols, 15 Iowa 161 (1863); Fuller v. Quesnel, 63 Minn. 302, 65 N. W. 634 (1895). *Contra*: Diversy v. Moore, 22 Ill. 331 (1859); Geno v. Heath, 36 Mich. 441 (1877). For a summary of these decisions, see 4 WILLISTON, CONTRACTS § 1259, n. 3. Williston states that the weight of authority supported the view that the surety would be discharged.

[22]First National Bank v. Holding, 90 Mont. 529, 4 P. (2d) 709; Citizens' State Bank v. Rosenwald, 256 N. W. 264 (N. D. 1934). If it is assumed that the N. I. L. did not abrogate the defense of extension of time, it is doubtful whether that act gives the holder in due course any protection in this situation that he did not have at the law merchant. It may be, however, that sections 60, 61, 62, and 57 of the N. I. L., notes 24 and 25 *infra*, have in some jurisdictions served to make the rights of a holder in due course more substantial than they were under the law merchant.

[23]This holding necessarily follows from the majority view that the N. I. L. has abrogated the suretyship defense.

nizes that a proper construction of sections 60, 61, and 62[24] of the act suggests that this defense should not be available against a holder in due course.[25] Manifestly, the theory that a holder taking with knowledge of the accommodation character of the maker is not a holder in due course and is thus subject to the same suretyship defenses as if the instrument were non-negotiable is not applicable to this situation. The most plausible argument that can be advanced to sustain the Mississippi court's position is that section 119(4) of the act denominates as a discharge any act which will discharge a simple contract; and in such a case at common law the surety is discharged. It has been pointed out, however, that a holder in due course is in a different position from that of an assignee of a simple contract, and that, since a negotiable instrument is not a single contract, but a series of contracts, the defenses set up under 119(4) of the act should be only those which could be pleaded against the particular contract of the person against whom the defense of discharge is offered.[26] A principal purpose of the N. I. L. is the protection of the holder in due course, and there appears to be no other situation in the law of negotiable instruments in which the mere acquisition of knowledge has limited the rights of a holder in due course in his dealings with the instrument.

However, the Mississippi court has some support in its holding,[27] and if the negotiable quality of an instrument does not have the effect of cutting off suretyship defenses, the holding is theoretically justifiable.

Since the N. I. L. can be logically construed either as abrogating or leaving unchanged the suretyship defense of an extension of time, the wisdom of the holding in the instant case can best be determined by a consideration of that phase of the law of suretyship. The rule that a surety is discharged by an extension, though relatively modern, is well settled.[28] It is generally assumed that the reason for the surety's discharge is that the creditor's agreement would prevent the surety from paying the holder and bringing a suit in the creditor's name against the principal to obtain reimbursement.[29] Another basis sometimes urged is that the contract with reference to which the surety promises is terminated by the creditor's agreement, and the surety is not a party to the new agreement and cannot be held liable on it though it is no more

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[24]These sections of the N. I. L., MISS. CODE ANN. (1930) §§ 2714, 2717, 2718 provide that the maker and drawer engage to pay the instrument according to its tenor and that the acceptor engages to pay it according to the terms of his acceptance.

[25]See Beutel's edition of BRANNAN, *op. cit. supra* note 4. The N. I. L. § 57, MISS. CODE ANN. (1930) § 2716 provides "A holder in due course holds the instrument free from any defect of titles of prior parties and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

[26]BRANNAN, *loc. cit. supra* note 4. This argument is particularly applicable in the instant case since there were two notes involved and the extension given was not on the accommodation maker's note. The court, however, attached no importance to this fact.

[27]See note 22 *supra*. See also Ousley, *Extension of Time for Payment as Releasing Sureties in Kentucky* (1934) 22 KY. L. J. 371.

[28]ARANT, SURETYSHIP § 68. BRANDT, SURETYSHIP AND GUARANTY (1878) § 296.

[29]Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683 (1890); Revell v. Thrash, 132 N. C. 803, 44 S. E. 596 (1903); U. S. Bldg. & Loan Ass'n v. Burns, 90 Mont. 402, 4 P. (2d) 703 (1931).

burdensome than the agreement terminated.[30] A third theory is that at the time of their transaction the parties contemplated that the creditor's relations with the principal should conform to ordinary business practices, this requiring that the creditor do nothing that is not ordinarily done in business that may increase the probability of the principal's non-performance or the surety's risk of ultimate loss in case he is called to pay.[31] The extension agreement is considered as changing the risk contemplated by the surety in that it makes the principal's performance in accordance with his original promise absolutely uncertain.

Although the result reached by an application of these theories has been consistently accepted by the courts, its expediency has been seriously questioned. As early as 1876, in *Polak v. Everett*,[32] a court expressed "considerable doubts about the justice of that principle", but declared that "from the time of Rees v. Berrington, 2 Ves. 540 [1795], it has been undisputed law, and nothing but the legislature can alter it." And although it seems that this rule remains "undisputed law", it has been observed by Williston[33] that "the surety's defense is equitable and should only be available to the extent of his possible injury", and Justice Cardozo has been emphatic in his denunciation of the rule,[34] suggesting that there should not be a complete discharge and that the measure of exoneration "ought in justice to be determined by the extent of the damage suffered" as in the case of subsequent insolvency of the principal and actual loss because of a refusal of the right of subrogation, or a loss of security.

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[30]Diehl v. Davis, 75 Kan. 38, 88 Pac. 532 (1907); Wright v. Deaver, 52 Tex. Civ. App. 13, 114 S. W. 165 (1908); Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056 (1906).

[31]ARANT, SURETYSHIP § 68.

[32]1 Q. B. D. 669 (1876).

[33]4 WILLISTON, CONTRACTS § 1222.

[34]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1937) 152: "I have no doubt that this rule may justly be applied whenever the surety can show that the extension has resulted in actual damage, as where the principal in the interval has become insolvent, or the value of the security has been impaired, though even in such circumstances the measure of exoneration ought in justice to be determined by the extent of the damage suffered. Perhaps there might be justice in permitting exoneration whenever the surety has tendered payment of the debt and demanded subrogation to the remedies against the debtor. Perhaps the burden of disproving prejudice ought to be cast upon the creditor. No such limitations have been recognized. The rule applies in cases where neither tender nor actual damage is established or pretended. The law has shaped its judgments upon the fictitious assumption that a surety, who has probably lain awake nights for fear that payment may some day be demanded, has in truth been smarting under the repressed desire to force an unwelcome payment on a reluctant or capricious debtor. The extended period has gone by; the surety has made no move, has not even troubled himself to inquire; yet he is held to be released on the theory that were it not for the extension, of which he knew nothing and by which his conduct could not have been controlled, he would have come forward voluntarily with a tender of the debt. Such rules are survivals of the days when commercial dealings were simpler, when surety companies were unknown, when sureties were commonly generous friends whose confidence had been abused, and when the main effort of the courts seems to have been to find some plausible excuse for letting them out of their engagements. Already I see some signs of a change of spirit in decisions of recent dates. I think we may well ask ourselves whether courts are not under a duty to go farther and place this branch of the law upon a basis more consistent with the realities of business experience and moralities of life."

Equitably, there seems to be no substantial reason for the absolute discharge of the surety where there has been no damage done, or where the surety has actually benefited by the extension. It is entirely possible that such a rule is a survival of the days "when commercial dealings were simpler, when surety companies were unknown, when sureties were commonly generous friends whose confidence had been abused, and when the main effort of the courts seems to have been to find some plausible excuse for letting them out of the engagements";[35] and that a policy of adherence to precedent has caused the courts to accept it because like the court in *Polak v. Everett*, they have felt that it is "undisputed law" and that "nothing but the legislature can change it."

If this be the case, it may be that the majority of the courts have found in the N. I. L. the legislative authorization necessary to permit a departure from the suretyship rule in the law of negotiable instruments.

But, assuming the desirability of a modification of the suretyship rule so as to permit the surety to be discharged only to the extent of his loss, there remains the question of whether the rule followed by the majority of the courts does not of necessity go too far in refusing to allow the surety to use this defense in those cases where he can prove actual damage done by the extension. Since the N. I. L. provides no basis whereby it can be held that the surety is discharged only in case of and to the extent of his loss, the courts have to consider an extension either as resulting in a complete discharge or as leaving the surety's liability completely unchanged. Therefore, a determination of the wisdom of the holding that the N. I. L. has abrogated this defense of extension of time resolves itself into a consideration of whether the ends of justice will best be served by a complete discharge in nearly[36] every instance or no discharge at all in any instance. The general purposes of the N. I. L. coupled with the fact that the accommodation maker is rarely injured might justify the majority holding. On the other hand, the possibility of the surety's injury by an agreement to which he has not consented gives support to the view adopted in the case under consideration.

But regardless of the attitude of the court in reference to whether the N. I. L. has abolished extension of time as a defense available to a surety whose character was known to the holder at the time of purchase, the holding that this defense can be set up against a holder who took the instrument without knowledge of the suretyship relation and in due course, is hard to justify. A surety on a non-negotiable instrument is not released unless the creditor had knowledge of the suretyship at the time the extension was made. A general policy of the law of negotiable instruments is to consider knowledge of the holder acquired after he became such as having no effect upon his rights in regard to the instrument. There is no reason why knowledge of a suretyship relation should be an exception. No interpretation of the N. I. L. requires that it should, and several provisions of the act strongly suggest that it should not.[37]

Stanny Sanders

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[35] *Ibid.*

[36] It is submitted that even though the N. I. L. is interpreted as permitting this defense, it does not require that this defense should be available as against a holder in due course. See note 37 *infra* and accompanying text.

[37] Sections 60, 61, 62, and 57 of the N. I. L. See notes 24 and 25 *supra*.

CONFLICT OF LAWS—INJUNCTION RESTRAINING PARTY FROM BRINGING SUIT IN ANOTHER STATE—RECOGNITION OF DECREE IN SECOND STATE.

Mrs. Kathryn Gillin, a resident of Louisiana, claimed benefits under four disability insurance policies issued to her in Louisiana by the Equitable Life Assurance Society, a corporation doing business in that state. She assigned a half interest in this claim to a Mississippi law firm. An action was brought on these policies in the Circuit Court of Hancock County by Mrs. Gillin. Pending this trial, the defendant Assurance Society obtained a preliminary injunction from a Louisiana court restraining further prosecution of this Mississippi case. While this restraining order was in effect, one of the members of the law firm died, and the present action is brought in the Chancery Court of Hancock County for a partition of the interest of the deceased member in the assignment made by Mrs. Gillin. The Assurance Society and Mrs. Gillin were joined as defendants in this action, and entered a plea in abatement, setting out the restraining order issued by the Louisiana court. HELD: The preliminary restraining order issued by the Louisiana court should be recognized as precluding the plaintiff from maintaining this action. *Equitable Life Assurance Soc. v. Gex' Estate*, 184 Miss. 577, 186 So. 660 (1939).

The solution of the problem arising in this case—what effect the forum should give to an injunction restraining prosecution in a foreign state, such injunction being issued by a state having jurisdiction of the parties and the cause of action—is by no means certain in this country. The United States Supreme Court has not specifically ruled on this point except to say that failure to entertain a suit by a non-resident, based on a foreign cause of action is not a denial of the rights accruing under the "privileges and immunities" clause of the Constitution.[1] The opinions in the instant case and *Fisher v. Pacific Mutual Life Insurance Co.*[2] make it appear that the Mississippi court has adopted the attitude that where a court has jurisdiction over all the contact points of a cause of action, and issues an injunction restraining the prosecution of this cause in a foreign forum, such injunction will be recognized "through comity" as being final in the determination of the proper forum. This by no means indicates that Mississippi has adopted a policy of giving "full faith and credit" to every injunction issued by another state, but it does indicate that the local courts will not inquire as to the correctness of the decision

[1]Douglas v. New York, N. H. R. R., 279 U. S. 377 (1929). For a full discussion of this point, see Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law* (1929) 29 COL. L. REV. 1; Comment (1930) 39 YALE L. J. 719.

[2]112 Miss. 30, 72 So. 846 (1916). Here the Mississippi court recognized an injunction issued by a Tennessee court preventing the plaintiff, a Tennessee resident, from bringing an action in Mississippi against a corporation doing business in Tennessee. This case is cited as the basis for the holding in the instant case. For a direct conflict in policy, see Nichols and Shepard Co. v. Wheeler, 150 Ky. 169, 150 S. W. 33 (1912) in which the Supreme Court of Kentucky held that the Tennessee injunction was not binding on its courts, but that the facts presented as the basis for the injunction were reviewable by its court. This case goes further by seemingly indicating that the decision would have been different if the injunction had been issued prior to the bringing of suit in Kentucky. Mississippi has held, however, that the time of the issuance of the injunction is immaterial. Davis v. Natchez Hotel Co. 158 Miss. 43, 128 So. 871 (1930).

of the foreign court to issue such restraining order, if the facts clearly show that such court had jurisdiction of the parties and the relations giving rise to the cause of action.[3]

Just how far this "jurisdiction of the contact points" will be carried is a matter of conjecture. The cases above cited appear to establish the doctrine that Mississippi will recognize a foreign injunction as being binding when the enjoining state has a more vital "interest" in the outcome of the suit, than Mississippi.

In recognizing the foreign injunction without questioning the correctness of its issuance, the Mississippi court in the instant case has gone much further than the courts of most of the states. The majority of the courts view all of the facts which gave rise to the issuance of the restraining order, and as a matter of discretion determine whether their court is the appropriate forum to decide the issue. Some of the guiding factors aiding these courts in making their decision are: (1) whether or not witnesses may be brought into court without incurring too much expense,[4] (2) whether or not the docket of the entertaining court is so crowded that this suit would result in delaying actions by local citizens, and increasing expense of administration[5] (3) whether or not the right as created by the law of some other state is of such a nature, that only the state can give the appropriate remedy.[6]

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[3]In Davis v. Natchez Hotel Co., 158 Miss. 43, 128 So. 871 (1930) the facts in the instant case were reversed in that Mississippi was the enjoining state with Louisiana the forum. Here the court held that Mississippi could enjoin her citizen from bringing an action in Louisiana—making the holding in the discussed case an application of this expressed attitude.

[4]Great Western Ry. v. Miller, 19 Mich. 305, 315 (1869) expresses the general attitude of the courts on this point: "It is not to be denied that much hardship is likely to arise where a person is called upon to defend himself against a charge arising out of transactions occuring at a distance, and out of the jurisdiction. Witnesses cannot always be compelled or induced to be present at the trial, and where a knowledge of localities becomes essential it is impossible to obtain a view by the jury." Further cases upholding this idea are Zeikus v. Florida East Coast Ry., 128 N. Y. Supp. 931 (1911); Western Union Telegraph Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708 (1895). See Blair, *supra* note 1, at 24, nn. 109, 110.

[5]A New York holding on this question most aptly illustrates the feeling of courts: "As a question of policy, it is intolerable that our courts should be impeded in their administration of justice and that the people of the state should be burdened with expense, in redressing wrongs committed in another state, for the benefit, solely, of its citizens, and where the remedy is in the enforcement of its statutes." Pietraroia v. New Jersey & H. R. R. & F. Co., 197 N. Y. 434, 91 N. E. 120 (1910). See also, Atchinson, T. & S. F. Ry. v. Weeks, 254 Fed. 513 (C. C. A. 5th, 1918); Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co., 30 Barb. 159 (N. Y. 1859). *Contra*: Mexican Nat. R. R. v. Jackson, 89 Tex. 113, 33 S. W. 857 (1896). Reynolds v. Day, 79 Wash. 499, 140 Pac. 681 (1914) (administration burden not sufficient to deny jurisdiction).

[6]Shaw v. Postal Telegraph & Cable Co., 79 Miss. 670, 684, 31 So. 222, 224 (1901) comments: "One state cannot be made the dumping ground for lawsuits between citizens of another state when they cannot recover from each other in their own state, where they made the contract, because of their own statute as construed by their own courts." Slater v. Mexican National R. R., 194 U. S. 120 (1904). Most of the cases on this point involve Workmen's Compensation Acts or some peculiar statutes. Mosely v. Empire Gas and Fuel Co., 313 Mo. 225, 281 S. W. 762 (1925); Lehman v. Ramo Films, 155 N. Y. Supp. 1032 (1915) Compare discussion in Note (1940) 12 MISS. L. J. 491.

An entirely conflicting attitude is expressed, however, by the decision of the Minnesota Court in the case of *State* ex rel. *Prall v. District Court*[7] in which the court said that failure to entertain a suit instituted by a non-resident is a violation of the "privileges and immunities" clause of the Federal Constitution. In these states which follow the Minnesota doctrine, the fact that an injunction is in existence is immaterial.[8] Such a conclusion is reached by arbitrarily reasoning that since it is not incumbent on one state to recognize a statute of another state preventing foreign prosecution of a cause of action, then it is not compulsory to recognize an injunction issued by another state to the same effect.[9]

This policy has led to "court shopping" by the plaintiff, who naturally seeks a forum whose rules of evidence and procedure, as well as liberal awards in his type of action, make it most profitable for him. It is obvious that the states which have adopted this attitude are overflowed with litigation between parties in whom they have not the slightest interest. The defendant is subjected to a large amount of expense in being compelled to import his witnesses from other states, and in many instances it increases the tax burden on the citizens of the entertaining state.

It has been suggested[10] that the only possible solution for the present problem is either legislation[11] or a Supreme Court ruling to the effect that injunctions are entitled to full faith and credit. But if either of these solutions is adopted the question immediately arises—would it not be possible for a

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[7]126 Minn. 501, 148 N. W. 463 (1914): "There was no discretion in the district court to decline the exercise of jurisdiction. And further why is the relator denied access to our courts? . . . It is because he is a citizen of Iowa. Therefore the refusal is violative of the constitution". Note (1933) 31 MICH L. REV. 963, 964, n. 3. For a contrast in policy in Mississippi, compare Shaw v. Postal Telegraph & Cable Co., 79 Miss. 670, 31 So. 222 (1901) and Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897), in which the plaintiff, an Illinois resident, sought damages in a Mississippi court for an injury occurring in Louisiana due to the negligence of an Illinois corporation. The court there said that since Mississippi had a statute providing that corporations doing business in Mississippi were subject to suit here, it would entertain the suit.

[8]Nichols & Shepard Co. v. Wheeler, 150 Ky. 169, 150 S. W. 33 (1912); State *ex rel* Bossung v. District Court, 140 Minn. 494, 168 N. W. 589 (1918); Fry v. Chicago R. I. & P. Ry., 157 Minn. 52, 195 N. W. 629 (1923); Union Pacific R. R. v. Rule, 155 Minn. 302, 193 N. W. 161 (1923); Kepner v. Cleveland, C. C. & St. L. Ry., 15 S. W. (2d) 825 (Mo. 1929) (evidence of foreign injunction rejected).

[9]Tennessee Coal, Iron, and R. R. v. George, 233 U. S. 354 (1914).

[10]Dainow, *The Inappropriate Forum* (1935) 29 ILL. L. REV. 867; Blair, *loc. cit. supra* note 1; Comment (1930) 39 YALE L. J. 719.

[11]The bill of the Committee on Jurisprudence and Law Reform of the American Bar Association in part provides: "That whenever any judgment, decree or order shall be rendered by any court of record of the United States or of any state or territory thereof, having jurisdiction of the subject matter and of the parties, requiring that money be paid, or that any act shall or shall not be done, or establishing a status, or investing any person with authority over property, such judgment, decree or order may be registered in any other of said courts, having jurisdiction to render similar judgments, decrees or orders, and when so registered shall have such faith and credit given to it as it has by law or usage in the court wherein it was rendered, and for the purpose of enforcement or utilization it shall have the same effect and like proceedings may be taken thereon as if the judgment, decree or order had been originally rendered by the court in which registration is had." See (1927) 52 A. B. A. REP. 292.

defendant to get an injunction in a state which had no connection with parties or the relations giving rise to the cause of action which would prevent suit in any state having a legitimate governmental interest that justice be done in the case?

Under the theory of the instance case, however, where all of the contact points (the parties, the relations giving rise to the cause of action, and the interest in seeing justice rendered) lie in one jurisdiction, then an injunction issued by that state should be given full faith and credit; but when the contact points are distributed between the enjoining state and the forum, then the forum should carefully consider all the elements of the case (the residence of the parties, the state's interest in the outcome of the suit, the interest of the state in which the cause of action arose and the practicality of entertaining such a suit) and weigh all of these factors to determine whether it should entertain the action. The existence of a foreign injunction should be regarded as substantiating evidence that the forum is not the appropriate one, but should not be considered as final.

Most of the objections to the majority doctrine have centered around the uncertainty as to whether or not a particular court will entertain the suit, the resulting encouragment of speculative litigation, the waste of money in bringing test actions, and the possibility that the claim will be barred by the Statute of Limitations.

The proposed solution, however, will make it not difficult even for a layman, and certainly easy for the average lawyer to determine what state or states have sufficient "governmental interest" in the case, so that the result will be to greatly diminish the likelihood of suits being brought in inappropriate forums.

Robert W. Wall, Jr.

DAMAGES—EXPENSE OF LITIGATION IN OBTAINING DISSOLUTION OF INJUNCTION—CONTINGENT FEE AGREEMENT.

Riley filed a bill against Hardy and others, claiming a landlord's lien on certain cotton and praying that an injunction issue restraining the holder of negotiable warehouse receipts for the cotton from disposing of the receipts. An injunction without notice issued. On final decree the injunction was dissolved, and defendants were allowed $62.50 as damages for attorney's fees. Defendants' solicitors had agreed to receive a contingent fee, and to be paid nothing unless the chancellor allowed a fee as damages. HELD: The lower court was in error in awarding the fees when they were to be paid on a contingent basis. *Riley v. Hardy*, 185 Miss. 765, 189 So. 514 (1939).

Contrary to the English practice, as a practical matter, in this country today, reimbursement for this expense incurred in law suits is not as a general rule allowed. Under our practice today, in actions for debt or damages, or for the recovery of land, the successful party cannot recover counsel fees, expenses of witnesses, travel cost, or any other outlay incident to preparing and trying his case, except, of course, where they are allowed by statute.

However, as is usually the case wherein some inflexible rule is attempted to be applied to a particular principle of law, there are some notable exceptions. According to one authority on the subject of damages,[1] the following are the most noteworthy:

(1) In proceedings in which a fund or estate is impounded by the court, such as receivership, bankruptcy, interpleader, and garnishment proceedings, the reasonable expenses, including counsel fees, incurred by a party or officer of the court in bringing in, preserving or protecting the fund or estate, will be allowed and paid out of the fund.[2]

(2) In New Jersey by statute[3] and in the federal courts according to a recent decision in the Circuit Court of Appeals,[4] the chancellor is empowered to allow reimbursement or expenses of employing counsel to the successful party, where the adverse claim or defense was unconscionable.[5]

(3) Allowance in suits for divorce or separation. Under the practice obtaining in most states, a wife suing or defending in an action for divorce or separation is entitled to an order requiring the husband to pay her reasonable counsel fees. The practice derives from the husband's duty to support the wife.[6]

(4) In numerous instances statutes have provided for the recovery by the plaintiff of his counsel fees in the prosecuting of particular classes of claims. Among the claims most frequently favored in this way are claims against railroads for wages or for loss or damage to freight and claims for the payment of life or fire insurance policies.[7] Other classes of cases sometimes so designated are election contests, actions for slander, eminent domain proceeding, suits against non-residents, wage claims, and suits by laborers and materialmen to enforce mechanics' liens.

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[1]McCormick, Damages (1935) c. 8.

[2]Trustees of Internal Improvement Fund v. Greenough, 105 U. S. 527 (1881). The principle is frequently applied to suits by minority stockholders to remedy wrongs done or threatened to the corporation. Decatur Mineral Sands Co. v. Palm, 113 Ala. 531, 21 So. 315 (1896). *Cf.* Miss. Code Ann. (1930) § 1734, providing for recovery of attorney's fees by an executor, administrator or guardian.

[3]N. J. Comp. Stat. (1910) § 445.

[4]Guardian Trust Co. v. Kansas City So. Ry., 28 F. (2d) 233 (C. C. A. 8th, 1928). This case has been reversed by the Supreme Court of the United States on another point. 281 U. S. 1 (1930).

[5]The recently passed federal "anti-injunction" act authorizes a recovery of attorney's fees as damages on federal injunction bonds. See Frankfurter & Greene, *Congressional Power over the Labor Injunction* (1931) 31 Col. L. Rev. 385, 414.

[6]Ortman v. Ortman, 203 Ala. 167, 82 So. 417 (1919); Redmond v. Broadus, 153 Miss. 889, 122 So. 194 (1929); Warner v. Warner, 175 Miss. 476, 167 So. 615 (1936); Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938); Price v. Price, 181 Miss. 539, 179 So. 855 (1938); Jensen v. Jensen, 119 Neb. 469, 229 N. W. 770 (1930); Smiley v. Smiley, 136 Wash. 241, 239 Pac. 551 (1925). The allowance may be made though the wife is unsuccessful in the suit. Townson v. Townson, 258 Fed. 517 (App. D. C. 1927).

[7]Atlantic Coast Line R. R. v. Coachman, 59 Fla. 139, 52 So. 377 (1910); Missouri K. & T. R. R. v. Simmonson, 64 Kan. 802, 68 Pac. 653 (1908). Smith v. Chicago, St. P. M. & O. R. R., 99 Neb. 719, 157 N. W. 622 (1916); Missouri, D. & T. R. R. of Texas v. Gade, 233 U. S. 642 (1914).

(5) When one by fraud or other actionable misconduct makes it necessary for another to bring or defend a suit, the latter in a new action may recover against the former the expenses of the earlier litigation. The mere bringing of a groundless civil action against another is not itself actionable misconduct, unless done maliciously.[8]

(6) Where the prior litigation is due to breach of contract or assumed duty. Among the instances in which a party may have been forced to incur the expense of engaging in a previous litigation by another's breach of contract or breach of a duty assumed are these: (a) Where a purchaser of land on the faith of his grantor's covenant of title fruitlessly defends the title. (b) Where a buyer of goods under a false warranty of title or quality sells again with a similar warranty, and is forced to defend claims against himself upon his own warranty.[9]

(7) The other exception, and the one with which this instant case deals, is the case of actions on statutory bonds given to secure the issuance of injunctions, attachments, writs of replevin, and the like. It is usually held that the counsel fees and expenses incurred in resisting the writ are recoverable in an action on the bond, but not those incurred in defending the main suit itself. Usually such bonds contain covenants to pay "all damages" in case it shall be determined that the writ or order was wrongfully granted. Occasionally the courts deny recovery of counsel fees altogether on such bonds, but the more usual attitude is to include in the damages awarded, the expense incurred in resisting and securing the dissolution of the wrongful writ or order, but not the expenses and fees of the general defense of the main action.[10]

In an action on an injunction bond or in assessing damages in the original suit after dissolution of the injunction, in the majority of jurisdictions, it is proper to make a reasonable allowance for attorney's fees as damages for the service rendered in procuring a dissolution of the injunction.[11]

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[8]McOsler v. Federal Insurance Co., 115 Kan. 626, 224 Pac. 53 (1924); First Nat. Bk. of Hutchinson v. Williams, 62 Kan. 431, 63 Pac. 744 (1901); Cretin v. Levy, 37 La. Ann. 182 (1885); Feldmesser v. Lemberger, 101 N. J. L. 184, 127 Atl. 815 (1925).

[9]Edwards v. Beard, 211 Ala. 251, 100 So. 101 (1924); Seitz v. People's Savings Bk., 140 Mich. 106, 103 N. W. 545 (1905); Hanley v. Street, 169 Mo. App. 593, 155 S. W. 43 (1913).

[10]Bartholomae & Roesing Brewing & Malting Co. v. Modzelewiski, 269 Ill. 539, 109 N. E. 1058 (1915); C. H. Albers Commission Co. v. Spencer, 236 Mo. 608, 139 S. W. 321 (1911); Brownlee v. Fenwick, 103 Mo. 420, 15 S. W. 611 (1891).

[11]Cooper v. Hames, 93 Ala. 280, 9 So. 341 (1891). To authorize the recovery of attorney's fees the issuance of the injunction must have been wrongful in its inception, and it must have been dissolved because of its wrongful issuance. Baggett v. Beard, 43 Miss. 120 (1870); Valentine v. McGrath, 52 Miss. 112 (1876); Wynne v. Mason, 72 Miss. 424, 18 So. 422 (1895); Leflore Co. v. Allen, 80 Miss. 298, 31 So. 815 (1902); Murphy v. Terrell, 89 Miss. 624, 42 So. 235 (1906); Gulfport Land Co. v. Augur, 95 Miss. 292, 48 So. 722 (1909); Vicksburg Water Works Co. v. Vicksburg, 99 Miss. 292, 54 So. 852 (1911); Thornton Claney Lbr. Co. v. O'Quinn, 115 Miss. 857, 76 So. 732 (1917); Mims v. Swindle, 124 Miss. 585, 87 So. 151 (1921); Philadelphia Bank v. Posey, 130 Miss. 530, 92 So. 840 (1922). It very generally has been held that counsel fees are recoverable as a part of the damages for the necessary services rendered on a successful appeal in getting rid of an injunction, as well as in the court below. Puget Sound Harbor No. 16 v. Aetna Acc. Co., 97 Wash. 413, 166 Pac. 785 (1917); State v. Graham, 68 W. Va. 1, 69 S. E. 301 (1910).

The theory followed by the federal courts and those state courts which refuse to allow attorney's fees as damages to be recovered on the bond, is that such damage is not contemplated by the statutes. On the other hand the states following the majority rule allow the injunction defendant compensation in a suit on the bond for his attorney's fees on the ground that the damage is a direct result of the wrongful issuance of the injunction.

There is a necessary differentiation between cases where the sole purpose of the equity suit is to obtain the injunction and where the issuance of the writ is merely ancillary to the main relief sought. If the injunction is the sole relief sought, counsel fees present no problem and are allowed. Nevertheless, some courts allow attorney's fees even in the latter situation if they are separable.[12]

The apparent deviation in the instant case from the majority rule which Mississippi follows may be explained by stating that in the instant case the action was one for contingent fees. It is of course essential that the person claiming the allowance should have become liable therefor and it is erroneous to make an allowance in the absence of any evidence to that effect. While a contract for a contingent or speculative fee is recognized as binding between an attorney and client, who make it, it is not a proper basis on which to charge the adverse party in an assessment of damages upon dissolution of an injunction. The reason is apparent. The assessment cannot exceed the damages actually sustained.[13]

The amount which shall be allowed as counsel fees is left to the discretion of the chancellor, who may exercise his independent judgment based on the condition of the parties and the surrounding circumstances. The amount must in all cases be reasonable and the party claiming the allowance cannot expect to recover fees for an unnecessary number of counsel. The amount allowed is more properly allowed on the basis of what a party could have obtained a good attorney for rather than what the claimant has become obligated to pay the particular attorney he or she has retained in the case. In no event can the recovery be more than such person has paid or become bound to pay.

William H. Fedric

TRESPASS TO PERSONAL PROPERTY—PRIVILEGE TO REPOSSESS PROPERTY UNDER CONDITIONAL SALES CONTRACT—USE OF FORCE NOT PERMITTED.

Plaintiff bought an automobile under a conditional sales contract, giving the dealer his note therefor payable in installments. Plaintiff paid all but the final installment, but due to the failure of defendant, to whom the vendor had assigned, to return the note and contract upon his tendering the final payment, he refused to pay the balance due. Defendant, upon finding the auto in

[12]Greene v. Quisenberry, 133 Ky. 561, 118 S. W. 361 (1909); Darling v. McBride, 86 Neb. 481, 125 N. W. 1088 (1910); Tatavich v. Petline, 31 N. M. 479, 247 Pac. 840 (1926).

[13]Hedges v. Myers, 5 Ill. App. 347 (1879). But *cf.* U. S. Fidelity Co. v. Traveler's Ins. Mach. Co., 188 Ky. 841, 224 S. W. 496 (1920). Here there was a contingent fee contract in an original suit, but none in the suit for the injunction. The court allowed attorney's fees, saying that a contract to which defendant was not a privy is no defense in this suit as to the obligation of the defendant to pay.

a parking lot with its doors locked, broke a window, took the car out of gear, and towed it off. After paying the final installment and regaining possession of the car in its damaged condition, plaintiff brought trespass. The trial court directed a verdict for plaintiff and instructed the jury that if they believed defendant had committed an aggravated and oppressive trespass they could, in their discretion, award punitive damages. Punitive damages were allowed in the sum of $2,500. HELD: Under such a contract the right to repossess the automobile did not justify the use of force or violence, and if defendant could not have repossessed peaceably, he should have resorted to the process of the courts. Punitive damages were properly allowed, although the amount was excessive and a *remittitur* was required. *Commercial Credit Co. v. Spence*, 185 Miss. 293, 184 So. 439 (1939).

Under conditional sales contracts giving the vendor the right to repossess upon default by the vendee without resorting to judicial process,[1] there is no set rule as to what degree of force the vendor might use in retaking the property without being liable to the vendee in an action for damages, and liability must be determined by the particular set of facts involved in each case. The majority of courts take the position that the vendor may use such force as may be reasonably necessary to regain possession.[2]

However, no matter how much latitude is allowed the vendor by the terms of the contract in repossessing the property in an extra-legal manner, the courts are practically in complete accord in holding that the rule cannot be extended to include committing an assault upon the vendee's person[3] or a breach of the peace,[4] breaking into the vendee's house,[5] even when the door is unlocked and no force is actually employed,[6] or breaking into his locked garage,[7] the condonation of such conduct being contrary to public policy. Courts which allow the use of such force as is reasonably necessary are inclined to be more lenient where the vendor obtains repossession by resorting to a ruse to gain entrance to the vendee's dwelling house[8] or by breaking into his place of business and no damage results other than to the chattel.[9]

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[1]The contract in this case gave the vendor, his assigns and representatives the right to ". . . take possession of the car . . . wherever it may be found, and . . . enter any premises therefor without notice or demand to the purchaser and without legal process, and the purchaser waives all claims for damages caused thereby." 185 Miss. at 295, 184 So. at 440.

[2]3JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (Bowers ed. 1933) § 1339.

[3]Silverstin v. Kohler & Chase, 181 Cal. 51, 183 Pac. 451 (1919); C. I. T. Corporation v. Reeves, 112 Fla. 424, 150 So. 638 (1933).

[4]First National Bank and Trust Co. v. Winter, 176 Okla. 400, 55 P. (2d) 1029 (1936).

[5]Agnew v. Jones, 74 Miss. 347, 23 So. 25 (1897).

[6]Girard v. Anderson, 219 Iowa 142, 257 N. W. 400 (1934).

[7]Dominick v. Rhea, 226 Mich. 594, 198 N. W. 184 (1924).

[8]North v. Williams, 120 Pa. 109, 13 Atl. 723 (1888).

[9]R.C.A. Photophone, Inc. v. Sharum, 189 Ark. 739, 75 S. W. (2d) 59 (1934). The contract in this case and the one in North v. Williams, 120 Pa. 109, 13 Atl. 723 (1888), cited *supra* note 8, were very similar to the contract in the instant case, and the courts in both of the former cases held that the vendor did only what he was entitled to do under the contract.

Considered in the light of this rule, together with the additional factor that the defendant repossessed without trespassing upon the plaintiff's premises, the rule laid down by the court in the instant case[10] appears to work harshly upon the vendor, curtailing his right to repossess to such an extent that the clause in the contract setting out his rights after default by the vendee is of no use to him.

In order to justify the course taken by the Mississippi court in deciding the case, a comparison is required of the theories adopted by the different courts with respect to the nature of a conditional sales contract. Under the common law concept, or so-called "pure" conditional sale, the vendee's interest amounts to little more than the right of possession until the full amount of the purchase price is paid.[11] Default in payment confers upon the vendor the immediate right to repossess, and upon his doing so vests in him the absolute ownership of the property, all rights of the vendee becoming non-existent and all money received by the vendor being retained by him as rental for the use of the chattel.[12]

Approaching the problem from an entirely different point of view, a number of other courts consider delivery of the chattel to the vendee as conveying to him some interest or estate therein, either legal or equitable, which repossession by the vendor does not necessarily terminate.[13]

In several other jurisdictions, the courts consider a conditional sales contract as being in the nature of a mere executory contract which is not executed until the vendee makes the final payment and the legal title passes to him from the vendor.[14] The logical inference under this theory is that default by the vendee would abrogate the contract and relegate the parties to their positions before entering into the contract. However, this theory is not followed to such lengths; and in instances of default and repossession, although the vendor may be required to return the money paid by the vendee less a reasonable amount for rental and depreciation, the courts revert either to the rules laid down by courts following the common law view or to those laid down by courts following the view that the vendee retains some interest in the property.[15]

In Mississippi and a small minority of states, the courts look upon a conditional sales contract as being practically analogous to a chattel mortgage,

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[10]The opinion reads: ". . . the right to take the property from the possession of the other party does not justify the use of force or violence to take it,—it must be done without force or violence, and if possession cannot be so obtained, then resort must be had to the processes of the courts." 185 Miss. 293, 297, 184 So. 439, 441 (1939). Compare with this the statement in Clark v. Service Auto Co., 143 Miss. 602, 108 So. 704 (1926), in which the court sets out the degree of force a lessor may use in dispossessing a lessee who is in default.

[11]However, some of the courts following this theory allow the vendee the right of redemption after reposession by the vendor, Harvey v. Anacone, 134 Me. 245, 184 Atl. 889 (1935), and he is given this right by statute in some states.

[12]3JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 1343.

[13]*Ibid.*

[14]*Ibid.*

[15]The courts of California and Minnesota fall in line with courts having the common law concept, and the courts of Alabama, Georgia, Idaho, Indiana and Washington fall in line with courts having the concept that the vendee retains some interest in the property.

retention of legal title by the vendor being regarded merely as security for the purchase price; and after repossession the vendor is required to treat and dispose of the property with reference to the equitable rights of the purchaser.[16]

In the absence of a breach of the peace, an assault upon the vendee's person, or a trespass resulting in damage to the vendee's premises, it is evident that under the "pure" conditional sale any damage to the chattel occurring during the vendor's act of retaking can effect none of the vendee's rights, which have been severed and become non-existent. On the other hand, under the theory of the Mississippi court, any damage to the chattel constitutes an invasion of the equitable rights of the vendee.

It is logical, therefore, that courts adopting different views as to the nature of a conditional sales contract will adopt different views on the question of what lengths a vendor may go in repossessing the property, and that decisions of the courts following the common law view should not necessarily have constituted a precedent for the Mississippi court in deciding the instant case.[17] Although the opinion fails to make this distinction, the court evidently was gretly influenced by it in making the decision.[18]

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[16]In Bankston v. Hill, 134 Miss. 288, 293, 98 So. 689, 690 (1924), the court, after making a statement in recognition of the views in other jurisdictions, said: ". . . the doctrine is thoroughly established in this state that where property is sold on condition that the title shall not pass until all the purchase price has been paid, such reservation of title is merely security for the purchase price, and that, at any time after default, the seller may retake the property and deal with it as security for the payment of the stipulated price and in reference to the equitable rights of the purchaser." Accord: White Sewing Machine Co. v. Conner, 111 Ky. 827, 64 S. W. 841 (1901); Mercier v. Nashua Buick Co., 84 N. H. 59, 146 Atl. 165 (1929).

[17]In note (1939) 52 HARV. L. REV. 690, adversely criticizing the instant case, North v. Williams, 120 Pa. 109, 13 Atl. 723 (1888), and R.C.A. Photophone, Inc. v. Sharum, 189 Ark. 739, 75 S. W. (2d) 59 (1934) were cited as authorities. It is well to note that both of these cases were decided by courts having the common law concept of conditional sales contracts.

[18]Decisions of the Kentucky court, which follows the same theory of the nature of conditional sales contracts, and whose decisions on questions involving such contracts run parallel in most instances to those of the Mississippi court, might serve as a criterion in seeking to determine what degree of force the defendant would have been allowed to use in order to repossess the automobile without resorting to judicial process. In General Motors Acceptance Corp. v. Shuey, 243 Ky. 74, 47 S. W. (2d) 968 (1932), the court held that the defendant was not liable for repossessing peaceably and without force an automobile left by the vendee on the street, even though he was not aware that the defendant was taking the vehicle. In General Motors Acceptance Corp. v. Dickinson, 249 Ky. 422, 60 S. W. (2d) 967 (1933), the court held that the defendant was not liable for peaceably repossessing a wrecked automobile from a public garage. In C. I. T. Corporation v. Short, 273 Ky. 190, 115 S. W. (2d) 899 (1938), the court held that the defendant's act of retaking peaceably and without force an automobile out of the vendee's open garage did not constitute a wrongful retaking. In all of these decisions, the court's language is in terms of "peaceable retaking" and "any force or violence," and the phrases "reasonable force" or "use of force reasonably necessary" are not mentioned anywhere in the opinions. In the last case cited, the court states that ". . . the seller may repossess the automobile in a peaceable manner without force, violence, breach of the peace, etc." thus indicating that the Kentucky court does not apply the rule that the vendor may use such force as may be reasonably necessary to retake, but applies the rule as laid down by the Mississippi court in the instant catse.

However, the part of the opinion dealing with the awarding of punitive damages is much more open to question.[19]

Ben C. Adams, Jr.

[19]The part of the opinion dealing with this question fails to state clearly upon what ground punitive damages were allowed, but merely states that the jury were warranted in their findings. This conclusion seems unjust to the defendant in view of the almost universal rule that a defendant is not liable for punitive damages for the commission of intentional acts done in good faith and under a claim of right. Biloxi City R. R. v. Maloney, 74 Miss. 738, 21 So. 561 (1897); Payne v. Cohen, 168 S. C. 459, 167 S. E. 665 (1933). However, the court made this statement in another part of the opinion: "It is sufficient to say here that the jury was well warranted in the conclusion that the misunderstanding, both of fact and the relative obligations of the parties, in respect to the production of the note and contract, was what caused the delay . . . in the payment of the last installment, and the appellant [defendant] should have so apprehended." 184 Miss. 293, 296, 184 So. 439, 441 (1939). It is apparent that the automobile was repossessed under a claim of right, but the court evidently was of the opinion that the defendant should be charged with notice of the reason the plaintiff had refused to pay the final installment, and if that were the case, the awarding of punitive damages was entirely justifiable. Pelton v. General Motors Acceptance Corp., 139 Ore. 198, 7 P. (2d) 263 (1932).

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